103

THE WORLD TRADE ORGANIZATION

Y 4. W 36: 103-86

The World Trade Organization, Seria...

HEARING

BEFORE THE

COMMITTEE ON WAYS AND MEANS
HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRD CONGRESS

SECOND SESSION

JUNE 10, 1994

Serial 103–86

Printed for the use of the Committee on Ways and Means

SUPERINTENDENT OF DOCUMENTS
DEPOSITORY

DEC 20 1994

BOSTON PUBLIC LIBRARY
GOVERNMENT DOCUMENTS DEPARTMENT

U.S. GOVERNMENT PRINTING OFFICE

83–735 CC WASHINGTON : 1994

For sale by the U.S. Government Printing Office
Superintendent of Documents, Congressional Sales Office, Washington, DC 20402
ISBN 0-16-046045-X

THE WORLD TRADE ORGANIZATION

4. W 36: 103-86

e World Trade Organization, Seria...

HEARING

BEFORE THE

COMMITTEE ON WAYS AND MEANS
HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRD CONGRESS

SECOND SESSION

JUNE 10, 1994

Serial 103–86

Printed for the use of the Committee on Ways and Means

SUPERINTENDENT OF DOCUMENTS
DEPOSITORY

DEC 20 1994

BOSTON PUBLIC LIBRARY
GOVERNMENT DOCUMENTS DEPARTMENT

U.S. GOVERNMENT PRINTING OFFICE

83–735 CC WASHINGTON : 1994

For sale by the U.S. Government Printing Office
Superintendent of Documents, Congressional Sales Office, Washington, DC 20402
ISBN 0-16-046045-X

COMMITTEE ON WAYS AND MEANS

SAM M. GIBBONS, Florida, *Acting Chairman*

DAN ROSTENKOWSKI, Illinois
J.J. PICKLE, Texas
CHARLES B. RANGEL, New York
FORTNEY PETE STARK, California
ANDY JACOBS, JR., Indiana
HAROLD E. FORD, Tennessee
ROBERT T. MATSUI, California
BARBARA B. KENNELLY, Connecticut
WILLIAM J. COYNE, Pennsylvania
MICHAEL A. ANDREWS, Texas
SANDER M. LEVIN, Michigan
BENJAMIN L. CARDIN, Maryland
JIM McDERMOTT, Washington
GERALD D. KLECZKA, Wisconsin
JOHN LEWIS, Georgia
L.F. PAYNE, Virginia
RICHARD E. NEAL, Massachusetts
PETER HOAGLAND, Nebraska
MICHAEL R. McNULTY, New York
MIKE KOPETSKI, Oregon
WILLIAM J. JEFFERSON, Louisiana
BILL K. BREWSTER, Oklahoma
MEL REYNOLDS, Illinois

BILL ARCHER, Texas
PHILIP M. CRANE, Illinois
BILL THOMAS, California
E. CLAY SHAW, JR., Florida
DON SUNDQUIST, Tennessee
NANCY L. JOHNSON, Connecticut
JIM BUNNING, Kentucky
FRED GRANDY, Iowa
AMO HOUGHTON, New York
WALLY HERGER, California
JIM McCRERY, Louisiana
MEL HANCOCK, Missouri
RICK SANTORUM, Pennsylvania
DAVE CAMP, Michigan

JANICE MAYS, *Chief Counsel and Staff Director*
DEBORAH G. COLTON, *Deputy Staff Director*
FRANKLIN C. PHIFER, JR., *Counsel to the Acting Chairman*
PHILLIP D. MOSELEY, *Minority Chief of Staff*

CONTENTS

	Page
Press release of Friday, June 3, 1994, announcing the hearing	2

WITNESSES

Office of the U.S. Trade Representative, Hon. Michael Kantor, U.S. Trade Representative	7
Fein, Bruce, Great Falls, Va	101
Frenzel, Hon. Bill, Brookings Institution, Washington, D.C	137
Katz, Hon. Julius L., Washington, D.C	143
Lang, Jeffrey M., Washington, D.C	55
Lovett, William A., Tulane University, School of Law, New Orleans, La	69
Manufacturing Policy Project, Pat Choate	95
U.S. Chamber of Commerce, Willard A. Workman	45

SUBMISSIONS FOR THE RECORD

Citizens Trade Campaign, Jane Danowitz, statement	146
International Ladies' Garment Workers' Union, Herman Starobin, statement	148
Multistate Tax Commission, statement and attachments	152
Semiconductor Industry Association, statement	194
Stewart, Terence P., Stewart and Stewart, Washington, D.C., letter	196
United States Association of Importers of Textiles and Apparel, Julia K. Hughes, statement	205
Wisconsin, State of, Hon. Tommy G. Thompson, Governor, statement	207

THE WORLD TRADE ORGANIZATION

FRIDAY, JUNE 10, 1994

House of Representatives,
Committee on Ways and Means,
Washington, D.C.

The committee met, pursuant to call, at 10:06 a.m., in room 1100, Longworth House Office Building, Hon. Sam Gibbons (acting chairman of the committee) presiding.

[The press release announcing the hearing follows:]

FOR IMMEDIATE RELEASE
FRIDAY, JUNE 3, 1994

COMMITTEE ON WAYS AND MEANS #22
U.S. HOUSE OF REPRESENTATIVES
1102 LONGWORTH HOUSE OFFICE BLDG.
WASHINGTON, D.C. 20515
TELEPHONE: (202) 225-1721

THE HONORABLE SAM M. GIBBONS (D., FLA.), ACTING CHAIRMAN,
COMMITTEE ON WAYS AND MEANS,
U.S. HOUSE OF REPRESENTATIVES, ANNOUNCES
A PUBLIC HEARING ON THE WORLD TRADE ORGANIZATION (WTO)

The Honorable Sam M. Gibbons (D., Fla.) Acting Chairman, Committee on Ways and Means, U.S. House of Representatives, today announced that the Committee will hold an additional day of public hearings on the Uruguay Round trade agreements in order to consider further the structure and mechanisms of the proposed new World Trade Organization (WTO). The hearing will be held on Friday, June 10, 1994, in the main Committee hearing room, 1100 Longworth House Office Building, beginning at 10:00 a.m. The Committee will hear oral testimony from Ambassador Michael Kantor, United States Trade Representative, and from other invited witnesses. The Committee also welcomes written testimony from interested members of the public for inclusion in the record.

A number of Members, both Democrats and Republicans, have raised questions about the role of the proposed new WTO in the world trading system, and how its authorities, particularly with respect to the dispute settlement mechanism, will impact on U.S. sovereignty and the sanctity of U.S. laws and regulations.

In announcing the hearing, Mr. Gibbons stated, "I am pleased to hold this hearing to discuss more fully the WTO, its operation, and the related policy implications for the United States. I believe this hearing will help to dispel any concerns Members might have about the WTO. When all the information about the WTO is reviewed, Members should be satisfied that the new WTO is grounded on the same legal principles as the General Agreement on Tariffs and Trade (GATT), which it replaces. At the same time, the WTO offers significant improvements in the enforcement of disputes and the development of rules, which will prove beneficial to U.S. interests."

DETAILS FOR SUBMISSION OF WRITTEN COMMENTS:

Persons submitting written statements for the printed record should submit at least six (6) copies of their statements by the close of business Friday, June 17, 1994, to Janice Mays, Chief Counsel and Staff Director, Committee on Ways and Means, U.S. House of Representatives, 1102 Longworth House Office Building, Washington, D.C. 20515. If those filing written statements for the printed record of the hearing wish to have their statements distributed to the press and the interested public, they may provide 200 additional copies for this purpose to the Committee office, room 1102 Longworth House Office Building, before the hearing begins.

FORMATTING REQUIREMENTS:

Each statement presented for printing to the Committee by a witness, any written statement or exhibit submitted for the printed record or any written comments in response to a request for written comments must conform to the guidelines listed below. Any statement or exhibit not in compliance with these guidelines will not be printed, but will be maintained in the Committee files for review and use by the Committee.

1. All statements and any accompanying exhibits for printing must be typed in single space on legal-size paper and may not exceed a total of 10 pages.

2. Copies of whole documents submitted as exhibit material will not be accepted for printing. Instead, exhibit material should be referenced and quoted or paraphrased. All exhibit material not meeting these specifications will be maintained in the Committee files for review and use by the Committee.

3. Statements must contain the name and capacity in which the witness will appear or, for written comments, the name and capacity of the person submitting the statement, as well as any clients or persons, or any organization for whom the witness appears or for whom the statement is submitted.

4. A supplemental sheet must accompany each statement listing the name, full address, a telephone number where the witness or the designated representative may be reached and a topical outline or summary of the comments and recommendations in the full statement. This supplemental sheet will not be included in the printed record.

The above restrictions and limitations apply only to material being submitted for printing. Statements and exhibits or supplementary material submitted solely for distribution to the Members, the press and the public during the course of a public hearing may be submitted in other forms.

* * * * * * * * * *

Acting Chairman GIBBONS. Well, good morning, ladies and gentlemen. I hope you all have enough pictures by now. Let's get down to business.

Well, this is a very important hearing we are having this morning, and I was kind of waiting on Mr. Gingrich. And so when he comes in, I want him to sit up here with us, and participate in this. And I am glad to see we have got such a large crowd here, in that I think it signifies the importance of this trade issue.

Today the Committee on Ways and Means is holding a hearing on the proposed new World Trade Organization [WTO], included in the results of the Uruguay round of the GATT multilateral trade negotiations. As you know, these agreements and this negotiation are historic, not just in an American sense, but in a world sense: 117 countries have come together for the first time and included within international rules not only tangible manufactured goods, but agricultural goods and trade in services and intellectual property and a whole host of other things.

The economy and the future of the world—to move forward economically and to raise the standard of living of all the people on earth and to promote peace—are really hinging upon the outcome of this agreement. And it is historic in nature.

The purpose of this hearing is to discuss the function and the role of the World Trade Organization and its policies and implications for the United States. Members, as well as the private sector, have raised questions concerning the authority of the World Trade Organization, and in particular how the new Uruguay round dispute settlement mechanism impacts existing U.S. law and practices and the ability of the Congress to change and enact laws in the future.

In my view, there are two main points to keep in mind. First, U.S. law prevails. Let me repeat that. First, U.S. law prevails. To the extent that there are any inconsistencies with the Uruguay round agreements or WTO decisions, the United States maintains the right to decide whether and how to implement dispute settlement decisions and the U.S. Congress retains its full powers under our Constitution to change or not to change U.S. laws. That is most important. Nothing that the WTO can do can change the powers of the U.S. Congress and the President acting together, of course, to change or to modify U.S. law.

Second, the World Trade Organization will continue the GATT practice of operating by consensus. And any substantive decisions will not affect U.S. international rights and obligations without U.S. consent, and without the congressional consent as exercised as we must do under our Constitution with the President.

We will hear testimony today from both sides of this issue. My hope is that the outcome will not only help to dispel concerns raised, but will in fact create additional support for the World Trade Organization as offering a significant improvement over the existing GATT structure for the administration of the post-Uruguay round trading system.

Before closing, let me state that it is essential to pass this implementing round legislation this year. Chairman Bob Matsui and myself have spoken and we just came from a meeting back in the library, and we both agree that we must complete Subcommittee on

Trade consideration of this legislation by the end of this month, and that the full committee as soon as possible after the end of this month will take up its implementation of these agreements.

Finally, I would like to welcome Mr. Gingrich to our hearing today. Well, he will be here in 1 second. If you are a leader like he is, you have got a lot of responsibilities. As we know, Mr. Gingrich is a strong proponent of open markets and free trade. And he was a great assistance to all of us in helping get ratification of the NAFTA negotiations.

So I wonder, Mr. Archer, if you have a statement that you would like to make.

Mr. ARCHER. Mr. Chairman, I just have some brief comments. First, thank you very much for holding this hearing today. I think it is important for us to clear the air on this issue and rise above a lot of the misinformation that is being put out in the minds of the public relative to the World Trade Organization as some infringement on the sovereignty of this country.

I particularly want to welcome Ambassador Kantor, and I particularly appreciate his participation in the continuing discussions and debate of the future role of the WTO and whether its structure and operation are going to allow for the complete protection of U.S., Federal and State laws.

And I am grateful also to Congressman Gingrich for his initiative in bringing this important issue to the forefront so the public can have an opportunity to hear the facts on it. It is, as you mentioned, Mr. Chairman, motivated by his desire to guarantee a strong and effective and viable trade agreement. All of us share the common goal of enhancing the U.S. position in the world trading market.

The United States has sought the reform embodied in the Uruguay round agreement for many, many years, under Republican as well as Democrat administrations. We need to give it the time and attention it deserves and ensure the focus remains on expanding trade and developing common trade disciplines. Through this hearing, the committee hopes to alleviate any existing concerns about the agreement's impact on U.S. laws and regulations and to reassure critics that the overall U.S. economic gains do not come at the expense of U.S. sovereignty.

As the Ambassador and the Chairman know, I believe very strongly that it is imperative that we preserve the ability of the United States to act in its own best interest, while allowing this country the benefits of active participation in a freer and more open world trading system.

The WTO offers improved mechanisms with which to combat the unfair trade practices of other countries. Furthermore, it protects our country and its industries in a wide range of areas, including intellectual property rights, services trade, and trade-related investment. We must not forget that we are the biggest exporter of services of any country in the world.

The expansion of trade in these areas necessitates a broadening of our ability to fight unfair trade practices and resolve disputes. I applaud U.S. efforts to assure successful completion of the undertaking. And I am glad to hear that you and Acting Subcommittee Chairman Bob Matsui have agreed to get this out rapidly. Now we must concentrate on the task at hand: The realization of a trade

agreement that greatly expands world trade, opens foreign markets and provides effective trade dispute resolution mechanisms.

I appreciate everybody being here and I look forward to the testimony.

[The prepared statement follows:]

Statement by the Honorable Bill Archer
Full Committee Hearing
June 10, 1994

I join the Chairman in welcoming the witnesses today. Ambassador Kantor, I especially appreciate your participation in the continuing discussions and debate of the future role of the WTO and whether its structure and operation will allow for the complete protection of U.S. federal and state laws. I am also thankful for Mr. Gingrich's initiative in bringing this important issue to the forefront, motivated by his desire to guarantee a strong, effective and viable trade agreement.

All of us share the common goal of enhancing the U.S. position in the world trading market. The United States has sought the reform embodied in the Uruguay Round agreement for years. We must give it the time and attention it deserves and ensure the focus remains on expanding trade and developing common trade disciplines.

Through this hearing, the Committee hopes to alleviate any existing concerns about the agreement's impact on U.S. laws and regulations and to reassure critics that the overall U.S. economic gains do not come at the expense of U.S. sovereignty. It is imperative that we preserve the ability of the United States to act in its own best interest, while allowing this country the benefits of active participation in a freer and more open world trading system.

The WTO offers improved mechanisms with which to combat the unfair trade practices of other countries. Furthermore, it protects our country and its industries in a wider range of areas including intellectual property rights, services trade and trade-related investment. The expansion of trade into these areas necessitates a broadening of our ability to fight unfair trade practices and resolve disputes.

I applaud U.S. efforts to assure successful completion of this undertaking. Now, we must concentrate on the task at hand -- the realization of a trade agreement that greatly expands world trade, opens foreign markets and provides an effective trade dispute-resolution mechanism.

We should not lose sight of our objectives by muddying the waters with extraneous matters. Important and valid concerns have been raised that are not trade-related or that are not necessary or appropriate to the implementation of this agreement. Some of these issues, while equally deserving of our time and energies, are better left for a time when Congress has an opportunity to carefully consider and debate the details.

I thank you all again for being here and look forward to hearing your statements.

Acting Chairman GIBBONS. Are there any other statements that members would like to make?

Mr. Thomas.

Mr. THOMAS. Just very, very briefly, I want to thank everyone involved in bringing these hearings as well. I appreciate the press being here. I think sunshine is a great disinfectant. The important thing is that we have both supporters and detractors of this new structure on the witness list. I hope they take their best shot and present their case as best they are able. It is important that they not make arguments later that didn't have a full and open airing of the issue. This is their chance, and I am anxious to see how well they do.

Thank you.

Acting Chairman GIBBONS. Mr. Gingrich, we welcome you here. I am sorry you weren't here to hear all the nice things members have said about you, particularly me, but we welcome you here.

Mr. GINGRICH. Well, let me say, I very, very much appreciate the committee allowing me to come and I appreciate very much you holding this hearing. I think as Mr. Thomas just said, the committee's thoroughness in ensuring that both supporters and critics have a full hearing today is a very encouraging step.

I hope we can reach some agreement on implementation language that meets the concerns of those who have raised some questions. But as you know, I have been a very strong supporter of a wider world market and freer trade, as both you and Mr. Rostenkowski have been, Mr. Chairman. I am very grateful to be with the two of you, and with Mr. Archer and have this opportunity for this hearing.

Thank you.

Acting Chairman GIBBONS. Thank you, sir.

All right. Ambassador Kantor, we are ready for you.

STATEMENT OF HON. MICHAEL KANTOR, U.S. TRADE REPRESENTATIVE

Ambassador KANTOR. Thank you, Mr. Chairman. I appreciate the opportunity to be here today to discuss the Uruguay round and its possible effects on U.S. sovereignty.

The Uruguay round agreement, of course, is the broadest, most comprehensive trade agreement in world history. It builds a new and better foundation for the global trading system. It contains a major reduction or elimination in tariff and nontariff barriers and a new set of trading rules suitable for the global economy of the 21st century.

Make no mistake about it, Mr. Chairman, this was a bipartisan effort. We were able to build on the work of our predecessors, Presidents Reagan and Bush, and Trade Representatives Brock, Yeutter and Hills, and the steadfast bipartisan support of Members of Congress of both parties.

The Uruguay round both epitomizes the post-World War II record of U.S. leadership and bipartisan cooperation toward the goal of more open markets and expanded trade which has led to a half century of unprecedented global growth. The United States led the effort to complete the round.

Now we must lead the effort to implement the round and make it work for the benefit of all people. And in that connection I appreciate the Chairman's remarks about the schedule that you indicated earlier. Failure to ratify the round would greatly undermine U.S. global leadership and deny U.S. workers and businesses major economic opportunities. In recent weeks, however, some have begun to express concern that the round agreement and the creation of the World Trade Organization to help administrate new agreement may infringe U.S. sovereignty.

This hearing today offers an excellent occasion to clear the air on this important and legitimate issue. The Clinton administration believes strongly in the importance of vigilantly protecting and enhancing U.S. sovereignty. Raising questions about this issue is proper and helpful. We should be concerned with how trade agreements affect U.S. sovereignty.

However, it is the conclusion of this administration that the round agreement and the WTO do not infringe on U.S. sovereignty. Numerous trade experts and other thoughtful commentators from all points of the political spectrum have agreed, in short, one, the WTO does not affect the sovereignty of the United States to pass its own laws, to enforce existing laws, or to set its own environmental or health standards. Only the U.S. Congress has the authority to change U.S. law.

Two, the Uruguay round agreement will not require the United States to adopt lower international food safety standards. It will permit the United States to continue to reject food imports that the United States considers to be unsafe and will permit States to maintain stricter food safety standards than the Federal Government.

The World Trade Organization continues and strengthens the GATT practice of operating by consensus. No substantive change in U.S. rights and obligations will apply to us unless we agree to it.

Let me say that again, Mr. Chairman. No substantive change in U.S. rights and obligations under this agreement will apply to this country unless we agree to those changes. I think that is a critical element in what has been done in articles 9 and 10 of the Uruguay round agreement. Key provisions on amendments, waivers and interpretations of the agreement are strengthened so as to safeguard U.S. interests.

U.S. sovereignty is enhanced under the WTO because a substantially improved dispute settlement system will permit us to enforce rights under the round agreement more effectively and at the same time preserve our trade laws. The United States will continue to be able to use section 301, antidumping and countervailing duty laws to address unfair trade practices and enforce our rights.

The administration is committed to continued open markets for U.S. goods and services abroad through the use of these laws. Other critics have raised concerns about access to the WTO and the transparency of the dispute settlement process. I share these concerns and have made it quite clear that we will insist that the World Trade Organization develop rules of procedure for all of its bodies, including the various councils and committees, that provide real access to the public, and transparency.

The dispute settlement process should be transparent, as well. There should be the opportunity for the public to participate through written submissions and other means. These proceedings themselves should be open to the public.

Recently, I have raised strong objections—excuse me, Mr. Chairman—to the lack of due process provided in connection with the recent decision on the tuna/dolphin case. I have written Peter Sutherland, the Director General of the GATT, and requested an open GATT Council meeting to conduct a full review of the procedural aspects of the proceedings and to permit nongovernmental organizations to participate in this review.

This is the first time, Mr. Chairman, this has ever been done, and we hope that Mr. Sutherland replies to this affirmatively. On the sovereignty question, I would urge you to study carefully the views of a range of thoughtful commentators. I won't read all of what they have said, but let me just say I think it is somewhat instructive that everyone from the Heritage Foundation, the American Enterprise Institute on one hand, and the Consumers Union on the other, from former Secretary of Housing and Urban Development Jack Kemp to Judge Bork to many others, have said that U.S. sovereignty is not affected, in fact may even be enhanced by what we have done under the Uruguay round.

I would just like to read one quote from a letter written to me by Judge Bork. "The sovereignty issue in particular is merely a scarecrow. Under our constitutional system, no treaty or international agreement can bind the United States if it does not wish to be bound. Congress should be reluctant to renege on an agreement except in serious cases, but that is a matter of international comity and not a loss of sovereignty."

It is critical to global and U.S. economic growth that we move ahead to implement the results of the round, but I, along with others in this administration, are committed to reviewing the legislation in as much depth as members wish to do. For that reason I will now spend a few minutes describing how the WTO works in those areas that have drawn criticism with regards to potential effects on U.S. sovereignty.

The WTO agreement codifies and requires, requires for the first time, continuation of the GATT practice of decisionmaking by consensus. In many cases, decisions under the GATT could be made by majority vote. That is under GATT article xxv:4. That has ended under the World Trade Organization. No longer does majority rule. In some cases in procedural matters, a two-thirds or three-quarters vote is required.

In substantive matters, I will say again, and I will repeat it, neither the United States nor any other country is bound to accept any change in its substantive rights or obligation, no matter what the vote is, in the GATT. Key requirements on waivers, interpretations and amendments to the agreement safeguard U.S. interests and prevent misuse of these provisions.

The dispute settlement understanding creates a more effective dispute settlement process. Congress identified this as a principal trade negotiating objective of the round and three administrations pursued that objective effectively. We will benefit from this system

because we bring more cases than any other country under the dispute settlement mechanism of the GATT.

We have won 80 percent of those cases, Mr. Chairman, and we were frequently frustrated, especially in the 1980s, as other countries used their ability to block under the GATT, to inhibit the ability of the United States to take these rulings and to force countries to change their policies which in effect kept U.S. products out of their markets. While the new system includes improvements, the system does not dictate changes in U.S. law.

Only Congress and the executive branch decide whether to implement panel recommendations and how to implement them. The WTO agreements, the dispute settlement understanding and panel reports cannot change U.S. law. Under article 9 in decisionmaking, the WTO agreement requires the WTO to continue the practice of decisionmaking by consensus. That is currently followed under the GATT, that has been the practice but not written. This provision is important as a first codification of a GATT practice. We have the same situation in interpretation. If the attempt to reach a decision by consensus on the interpretation provision of one of the agreements is unsuccessful, the interpretation can be adopted by a vote of three-quarters of the members, not merely those voting. That is article 9.2 of the WTO agreement. The current GATT requirement is a majority of those voting.

On waivers, the WTO eliminates the possibility that nations could use this provision to escape from their obligations. For example, if an agreement includes a transition period or stage implementation and the member requesting the waiver has not implemented the obligation, that waiver can be granted only on the basis of consensus. That is article 9.3, footnote 4 of the World Trade Organization Agreement. Thus the country must implement these provisions before it can seek a waiver.

In other cases under the WTO, a waiver may be granted by a vote of three-quarters of all members. That is article 9.3. Again, this is a higher threshold than in the GATT.

Under amendments, the United States must agree to substantive changes in our rights and obligations for those changes to apply to us. Key provisions such as most-favored-nation obligations, amendment and decisionmaking rules can only be made when all WTO members agree to them. Let me say that again: When all WTO members agree to them. That is article 10.2.

Similarly, any changes to the dispute settlement understanding can be made only by consensus with no recourse to voting. While nonsubstantive changes in the agreement can be made based on a vote of two-thirds of the members, there must be a prior vote of three-quarters of the members that this change does not affect substantive rights and obligations. That is article 10.5.

The Uruguay round agreement creates an improved dispute settlement system which I mentioned before and enhances our ability to enforce U.S. rights under the agreement. Improvements include stringent time limits on each stage of the process, improved transparency and new right of appeal, no blocking the adoption of panel reports, cross-retaliation, and effective procedures for authorizing retaliation.

The Uruguay round will not impair the effective enforcement of U.S. trade laws, especially section 301, and our antidumping and countervailing duties laws. Our trade laws will continue to be our most important and effective response to dumping and subsidies that injure U.S. industries.

As a result of the Uruguay round agreement, section 301 will even be more effective than it has been in the past in addressing foreign unfair trade barriers. We have an improved dispute settlement system with tight time periods for action, panel reports that cannot be blocked by one party and the right of cross-sectorial retaliation. Those changes correct deficiencies in the old system and mean when we bring a successful challenge, we will have the leverage to insist that the offending government remedy its violation.

Our negotiators went to great lengths to make absolutely clear in the agreement that governments are free to establish their own levels of protection for health and that they are not under pressure to lower their standards. At the same time, the agreement will provide a means for challenging foreign restrictions of food imports which claim to protect consumers, but are really designed to protect foreign farmers and food manufacturers from imports from the United States.

Mr. Chairman, we live in an interdependent world with a globalized economy. As a mature economy, our future growth and our ability to create high wage jobs is linked to our ability to open markets and expand trade. The Uruguay round makes trade a two-way street, while fostering growth here at home and around the world. It is a single undertaking.

For the first time in history in a multilateral agreement, Mr. Chairman, every nation, 117, now, members of the GATT, those that will come after and be provided access to the WTO, must undertake the same responsibilities. That is the most critical aspect of this agreement.

When we understand that, we will understand we are finally reaching the stage where comparability, a two-way street, a level playingfield, are becoming part of a world trading system. From time to time we will get into disputes with other countries. They will challenge our trade practices and we will challenge theirs. But that does not mean we will lose our sovereignty.

It does mean that we need a strong, effective and fair dispute settlement process. We must ask ourselves this question, will we engage in the world, or will we withdraw behind walls of fear? Rejecting the Uruguay round would end 50 years of the United States leading global growth in expanded trade and deprive U.S. workers and companies of vast economic opportunities. Embracing the round means the United States leads the world on a path of increased prosperity into the next century. And the nations that join the WTO, especially the United States, will reap the benefits of the global economy without losing sovereignty.

Thank you very much.

[The prepared statement follows:]

Testimony to the House Ways and Means Committee
Ambassador Michael Kantor
United States Trade Representative
June 10, 1994

THE WORLD TRADE ORGANIZATION AND U.S. SOVEREIGNTY

INTRODUCTION

Mr. Chairman, thank you very much. I appreciate the opportunity to be here today to discuss with you the Uruguay Round agreement and how it affects U.S. sovereignty.

Mr. Chairman, last December in Geneva, the United States took the lead in completing the Uruguay Round, bringing seven years of negotiations to a successful conclusion. On April 15th, 117 nations signed the agreement, paving the way for vitally needed global economic growth.

The broadest, most comprehensive trade agreement in history, the Uruguay Round builds a new -- and better -- foundation for the global trading system. It contains a major reduction or elimination of tariff and non-tariff barriers, and a new set of trading rules suitable for the global economy as we approach the 21st century. These rules aid key sectors of our economy that are growing and becoming more important for U.S. competitiveness.

The Uruguay Round plays to our strengths as the world's largest trading country, exporter and most productive economy. It opens foreign markets to an unprecedented degree at precisely the time when our companies and workers have honed their competitive edge. It will create thousands of additional high-wage, high-skill jobs for U.S. workers in the coming decade. For these reasons, the Uruguay Round agreement has received broad support from the U.S. private sector.

President Clinton is gratified that this Administration had the opportunity to help conclude this historic agreement, but make no mistake about it, this was a bipartisan effort. We were able to build on the work of our predecessors Presidents Reagan and Bush, and Trade Representatives Brock, Yeutter and Hills, and the steadfast, bipartisan support of members of Congress from both parties.

Indeed, the Uruguay Round both caps off and epitomizes the Post-World War II record of U.S. leadership and bipartisan cooperation toward the goal of more open markets and expanded trade, which has led to a half century of unprecedented global growth.

The United States led the effort to complete the Round. Now, we must lead the effort to implement the Round and make it work to the benefit of all people. Failure to ratify the Uruguay Round would greatly undermine U.S. global leadership, and deny U.S. workers and businesses of major economic opportunities.

In recent weeks, however, concerns have been expressed that the Uruguay Round agreement and the creation of the World Trade Organization (WTO), may infringe on U.S. sovereignty. This hearing today offers an excellent occasion to clear the air on this important and legitimate issue.

Mr. Chairman, the Clinton Administration believes strongly in the importance of vigilantly protecting and enhancing U.S. sovereignty. Raising questions about this issue is proper and helpful. We should be concerned with how trade agreements affect U.S. sovereignty.

However, it is the conclusion of the Clinton Administration that the Uruguay Round agreement and the WTO do not infringe on U.S. sovereignty. Numerous trade experts and other thoughtful

commentators from all points on the political spectrum have agreed. In fact, by creating jobs and fostering economic growth in this country, the Uruguay Round strengthens our competitiveness, and ***enhances*** U.S. sovereignty.

In short:

- The WTO does not affect the sovereignty of the U.S. to pass its own laws, to enforce existing laws, or to set its own environmental or health standards. Only the U.S. Congress has the authority to change U.S. law.

- The Uruguay Round agreement will ***not*** require the United States to adopt lower international food safety standards; ***will*** permit the United States to continue to reject food imports that the United States considers to be unsafe; and <u>will</u> permit states to maintain stricter food safety standards than the federal government.

- The WTO continues and strengthens the GATT practice of operating by consensus. No substantive change in U.S. rights and obligations will apply to us unless we agree to it.

- Key provisions on amendments, waivers and interpretations of the agreement are strengthened so as to safeguard U.S. interests.

- U.S. sovereignty is enhanced under the WTO, because the substantially improved dispute settlement system will permit us to enforce rights under the Uruguay Round agreement more effectively and at the same time preserve our trade laws.

- The U.S. will continue to be able to use Section 301, antidumping and countervailing duty laws to address unfair trade practices and enforce our rights. The Administration is committed to continue to open markets for U.S. goods and services abroad.

Other critics have raised concerns about access to the WTO and the transparency of the dispute settlement process. I share these concerns and I have made it quite clear that we will insist that the WTO develop rules of procedure for all of its bodies, including the various councils and committees, that provide real access to the public and transparency.

The dispute settlement process should be transparent and there should be the opportunity for the public to participate through written submissions and other means. These proceedings themselves should be open to the public.

Recently, I have raised strong objections to the lack of due process provided in connection with the recent decision in the Tuna/Dolphin case. I have written Peter Sutherland, the Director-General of the GATT, and requested an open GATT Council meeting to conduct a full review of the procedural aspects of the proceedings and to permit non-governmental organizations to participate in this review.

It should be noted that in negotiating the Uruguay Round, this administration, as well as the ones before it, followed the directions of Congress. For example, the 1988 trade act directs us to obtain improvements in the dispute settlement system. Section 1101(b) sets the goal of a more effective and expeditious dispute settlement system that enables better enforcement of U.S. rights. We accomplished this.

Turning to the sovereignty question, I would urge you to study carefully the views of a range of thoughtful commentators.

Professor John Jackson, author of the landmark treatise, *World Trade and The Law of the GATT*, testified to the Senate Finance Committee:

> It is doubtful that the WTO provides any additional institutional power to that effectively exercised by the GATT, and indeed, WTO clauses provide some additional checks and balances against misuse of authority. . . . A careful examination of the WTO Charter leads me to conclude that the WTO has no more real power than that which existed for the GATT under previous agreements...

Peter Suchman, former Deputy Assistant Secretary of Treasury for Tariff Affairs in the Nixon, Ford and Carter Administrations, observed:

> The World Trade Organization (WTO) represents a significant advance in the reform of the GATT. The Uruguay Round final provisions on dispute settlement and the WTO represent a major victory for U.S. negotiators, who had rejected the WTO concept as proposed early in the Round by Canada and the EC. The U.S. held out on the WTO as a means to ensure that its own trade laws, including Section 301, would not be unreasonably limited. And it worked! The WTO strikes a reasonable balance between the need to increase the effectiveness of the GATT panel system and the interests of the United States as the world's leading trading country...
>
> The United States, in pressing for freer trade and as the world's leading exporting nation, has historically been a plaintiff at the GATT more than a defendant. It is the United States that therefore has the greatest interest in an effective and expeditious GATT dispute settlement mechanism. We should be particularly pleased at the result of the Uruguay Round because the United States won inclusion of many of the provisions increasing the effectiveness of the dispute resolution process that it had suggested.

Joe Cobb, former Chief Economist for the Senate Republican Policy Committee and Minority Staff Director for the Joint Economic Committee of Congress, who now holds the John M. Olin chair at the Heritage Foundation, has written:

> The creation of the World Trade Organization as a permanent rulemaking assembly for nations eager to expand exports is an historic achievement...Without this uniform system of international trade law and the new rules in the Uruguay Round agreement, including the enforcement provisions, the U.S. would find it much harder to continue its economic progress into the 21st century.

Judge Robert Bork, now at the American Enterprise Institute, has written:

> The sovereignty issue, in particular, is merely a scarecrow. Under our constitutional system, no treaty or international agreement can bind the United States if it does not wish to be bound...Congress should be reluctant to renege on an agreement except in serious cases, but that is a matter of international comity and not a loss of sovereignty.

Finally, Rhoda Karpatkin, President of Consumers Union, said when endorsing the Round:

> Through the mechanisms of competition and economic expansion [the Uruguay Round] will benefit American consumers. And, it will benefit consumers around the world, At the same time, it will permit the U.S. to maintain strong health, safety and environmental standards. We urge the Congress to ratify the Agreement this year, so that consumers can begin to real

its benefits beginning in 1995.

Today, you will hear other views on the effect of the WTO Agreement and the Dispute Settlement Understanding on U.S. sovereignty. Careful consideration of the Agreement, the history of practice in the multilateral trading system, and our overall economic interests lead to the conclusion that acceptance of this Agreement is in the interest of the United States.

The Uruguay Round agreement is ambitious and far-reaching, and consequently the implementing legislation will also be a major undertaking. I appreciate very much the work that the members of this committee along with their staffs have already done in drafting the legislation that will implement the Round.

It is critical to global and U.S. economic growth that we move ahead to implement the results of the Uruguay Round but I, along with others in this Administration, are committed to reviewing the legislation in as much depth as members want. For that reason, I will now spend a few minutes describing how the WTO works in those areas that have drawn criticism with regards to U.S. sovereignty.

DECISION MAKING IN THE WTO

The GATT has operated on the basis of consensus since its creation in 1947 notwithstanding the many provisions in the GATT text on voting. The WTO Agreement explicitly continues and strengthens this GATT practice. This limits the possibility that now exists under the GATT that other governments could impose decisions on the United States by a majority vote. Under the WTO Agreement, no substantive change in the rights and obligations of the United States can occur unless the United States agrees to it.

Another part of the Uruguay Round agreement, the Dispute Settlement Understanding (DSU), creates a more effective dispute settlement process, which Congress identified as a principal trade negotiating objective of the Uruguay Round. While this more effective dispute settlement system will provide prompt decisions, cover more issues, and permit sanctions for failure to implement panel recommendations, it does not directly affect U.S. law. Only Congress and the Executive Branch decide whether to implement panel recommendations and how to implement them. The WTO Agreements, the DSU, and panel reports cannot change U.S. law.

Specific Provisions in the WTO Agreement

Article IX: Decision-Making

Article IX of the WTO Agreement **requires** the WTO to continue the practice of decision-making by consensus that is currently followed under the GATT. This provision is important as the first codification of a GATT practice. In the GATT, each contracting party has one vote and currently the GATT provides that, with few exceptions, decisions are to be taken by a majority of the votes cast. However, in reality, GATT practice has modified this legal requirements and uses voting as a fall-back only if there is a failure to reach a consensus. The WTO Agreement requires Members to continue this approach and requires more countries to vote in favor of specific proposals.

Key provisions related to interpretations of the Uruguay Round agreement, grant of waivers, and most importantly amendments of the Agreement contain stronger safeguards for U.S. interests or carry forward GATT rules in the WTO.

On interpretations, if the attempt to reach a decision by consensus on the interpretation of a provision of one of the

agreements is unsuccessful, the interpretation can be adopted by a vote of three-fourths of all members (not merely those voting). The current GATT requirement is a majority of those voting.

On waivers, the GATT has always included a mechanism by which countries could seek waivers of their obligations in certain circumstances, and the WTO continues that practice. However, provisions have been included to eliminate the possibility that nations could use this to escape from their obligations.

For example, if an agreement includes a transition period or staged implementation and the Member requesting the waiver has not implemented the obligation, that waiver can be granted only on the basis of consensus.

This will effectively eliminate requests for waivers of obligations under agreements such as the Agreement on Trade-Related Aspects of Intellectual Property (TRIPs) and the Agreement on Agriculture that could be used to avoid implementation of critically important obligations. These waivers could be granted under GATT rules based on a majority of two-thirds of the votes cast. In other cases under the WTO, a waiver may be granted by a vote of three-fourths of all Members, again a higher threshold than in the GATT.

Article X: Amendments

The WTO establishes a process for adoption of amendments that contains safeguards that prevent substantive changes in a member's rights that it does not agree to. First, the Members must decide whether to transmit a proposed amendment to the members for domestic consideration. If an amendment is transmitted, individual members then decide whether to accept the proposed amendment. Only when the requisite number of Members agree to the amendment does it become effective for any Member.

The United States must agree to substantive changes in our rights and obligations for those changes to apply to us. Key provisions, such as most-favored-nation obligations, amendment and decision-making rules can only be made when all WTO members agree to them. Similarly, any changes to the DSU can be made only by consensus with no recourse to majority or other kinds voting.

Amendments affecting the rights and obligations of Members under other provisions of the WTO Agreements will be transmitted to the members for consideration upon a vote of two-thirds of the members. These amendments become effective when accepted, i.e., ratified or implemented, and are effective only for those Members that accept them.

The WTO provision is based on GATT Article XXX which also contains a mechanism where GATT Contracting Parties may decide that a contracting party that has not accepted an amendment is free to withdraw from the GATT or remain a contracting party with the consent of the other Contracting Parties. This decision can be taken by a majority vote. Under the WTO, there must be a vote of three-fourths of the members to invoke this provision. The GATT has never used this provision of Article XXX.

Some critics of the WTO have raised concerns about the possibility that the United States would be invited to leave the WTO if we did not accept a particular amendment. This is simply not a realistic possibility.

WTO members would, in effect, have to sever multilateral trade ties with the United States. Both sides would be free to increase tariffs, impose non-tariff barriers and take other actions currently controlled by agreed rules. Such action with respect to an important trading country, such as the United States, would

create significant uncertainty and instability in world markets.

DISPUTE SETTLEMENT PROCESS

The Uruguay Round agreement creates an improved dispute settlement system that will significantly enhance our ability to enforce U.S. rights under that agreement. Improvements include stringent time limits on each stage of the process, improved transparency, a new right of appeal, no blocking of the adoption of panel reports, cross-retaliation, and effective procedures for authorizing retaliation.

It is clear that the United States will benefit greatly when we initiate a WTO dispute settlement action. This is particularly important for us, since we bring more cases than any other country. We have been able to use the GATT dispute settlement system to win important cases, concerning Japan's barriers to imports of agricultural products, Korea's beef quotas, EC oilseed subsidies, and Norway's procurement practices. Reaping the benefits of some of those wins has proved difficult under the GATT system.

Effective action was frequently prevented because parties blocked adoption of adverse GATT panel reports. The European Union, for example, blocked adoption of 4 adverse panel reports in cases that we won in the agriculture sector within a period of 2 years. These cases involved U.S. exports of citrus, canned fruit, pasta and wheat flour.

Congress recognized this problem and mandated in the 1988 trade act that we obtain improvements in the dispute settlement system. Section 1101(b) sets the goal of a more effective and expeditious dispute settlement system that enables better enforcement of U.S. rights. The improvements that we obtained in the dispute settlement rules achieve those objectives and more. In addition to stringent time limits for each stage of the dispute settlement process, creation of an Appellate Body, adoption of reports and authorization of retaliation unless there is a consensus to reject the report or request, this improved process includes cross-retaliation, a measure strongly supported by U.S. business groups.

The changes in procedures for adoption of panel reports and requests to suspend concessions have been the focus of considerable debate. As noted above, GATT practice has been to adopt a panel report when no contracting party objects to that action (a consensus to adopt). Similarly, requests to withdraw or suspend concessions are granted only if no contracting party objects.

In the DSU, the GATT practice of decision by consensus is codified and all decisions must still be by consensus, but the focus of the consensus decision has changed. Thus, the Dispute Settlement Body will adopt a panel report or an Appellate Body report, or approve a request to suspend concessions unless there is a consensus to reject the report or the request.

When a report is adopted, the Member affected must decide whether -- and if so, how -- to bring the measure at issue into conformity with the relevant Agreement. These improved dispute settlement rules, in other words, do not dictate a result to the government whose law has been found to be inconsistent with a Uruguay Round agreement obligation.

A WTO dispute settlement panel recommendation does not change U.S. law. Only Congress can change U.S. law to implement a panel recommendation. In this respect, the WTO dispute settlement system is no different than the GATT system.

If the United States "loses" a case, we, or any other WTO Member, can choose to (1) pay compensation in the form of protective trade concessions, (2) negotiate a mutually satisfactory solution to the problem with the complaining party, or (3) take no action and allow the aggrieved government to withdraw some equivalent level of WTO concessions. In all cases, the solution is linked to the damage (nullification or impairment of benefits) caused by the alleged violation. There is no such thing as requiring payment of "perpetual damages."

Even though we, or any other WTO Member, are not able alone to block another government's request for authorization of retaliation, this should not affect U.S. policy objectives and our pursuit of those objectives. Under the current GATT, we face the possibility of retaliation from our major trading partners. The Europeans have shown no reluctance to counter-retaliate against U.S. action in the past. Imposing retaliation is never an easy decision and a WTO member must decide whether it is in that country's best interest to act against trade with a major market such as ours.

The Administration will use WTO dispute settlement in the many cases that we bring to enforce our rights under the Uruguay Round agreements. In other areas, we will continue to exercise our right to act unilaterally under section 301 and to choose whether to implement dispute settlement recommendations.

The DSU is an improved system for the enforcement of U.S. rights under the WTO Agreements. In these cases, the United States will receive a fast and more enforceable decision. In cases where other WTO Members successfully pursue dispute settlement procedures with the United States, Congress and the Executive Branch must decide on the appropriate response.

U.S. TRADE LAWS PRESERVED INTACT

The Uruguay Round will not impair the effective enforcement of U.S. trade laws, especially Section 301 and our antidumping and countervailing duties laws. In particular, our trade laws will continue to be our most important and effective response to dumping and subsidies that injure U.S. industries.

As a result of the Uruguay Round agreements, Section 301 will be even more effective than it has been in past in addressing foreign unfair trade barriers. We have an improved dispute settlement system with tight time periods for action, panel reports that cannot be blocked by one party and the right of cross-sectoral retaliation. These changes correct deficiencies in the old system and mean that when we bring a successful challenge, we will have the leverage to insist that the offending government remedy its violations.

Furthermore, the Uruguay Round agreements will substantially enhance the ability of the United States to use Section 301 successfully to pursue unfair foreign practices in the areas of trade in services and the protection of intellectual property rights. These areas will be subject to the disciplines of a multilateral trade agreement for the first time and the DSU permits "cross-retaliation." For example, when the United States successfully challenges a violation of the TRIPs Agreement, the defending government will know that unless the matter is resolved the United States can take equivalent counter-action under Section 301 against that country's exports of goods to the United States.

Some countries have even tried to claim that the WTO will restrict the ability of the United States to use Section 301 because it requires a member to abide by the DSU rules and procedures when it seeks to redress a violation of the WTO. There is however absolutely no basis for such a claim. Since

1979 Section 301 has required the Trade Representative to resort to the dispute settlement provisions of the GATT if a section 301 investigation involved a GATT agreement. The DSU will therefore make no changes in the way the United States conducts Section 301 investigations.

Section 301 will also remain fully available to address unfair practices that are not covered by the WTO or GATT or that are committed by non-WTO members. As in the past, such investigations will not involve recourse to multilateral dispute settlement procedures. Moreover, the mere fact that the Uruguay Round agreements treat a particular subject matter -- such as intellectual property rights -- does not mean that the Trade Representative must initiate DSU proceedings in every Section 301 investigation involving that subject matter. In the event that the actions of the foreign government in question fall outside the disciplines of those agreements, the Section 301 investigation would proceed without recourse to DSU procedures.

There is no basis for concern that the Uruguay Round agreements in general, or the DSU in particular, will make future Administrations more reluctant to apply Section 301 sanctions that may be inconsistent with U.S. trade obligations because such sanctions cculd engender DSU-authorized counter-retaliation. Just as the United States may now choose to take Section 301 actions that are not GATT-authorized, governments that are the subject of such actions may choose to respond in kind. That situation will not change under the Uruguay Round agreements. The risk of counter-retaliation under the GATT has not prevented the United States from taking unauthorized actions in connection with such matters as semiconductors, pharmaceutical, beer, and hormone-treated beef.

FOOD SAFETY STANDARDS

Our negotiators went to great lengths to make absolutely clear in the Agreement that governments are free to establish their own levels of protection for health, and that they are not under pressure to lower their standards. At the same time, the Agreement will provide a means for challenging foreign restrictions on food imports which claim to protect consumers, but are really designed to protect foreign farmers and food manufacturers from imports from the United States.

Paragraph 6 of Article 5 of the Agreement on the Application of Sanitary and Phytosanitary Measures provides that "Members ensure that such measures are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility." For these purposes, "a measure is not more trade-restrictive than required unless there is another measure, reasonably available taking into account technical and economic feasibility, that achieves the appropriate level of sanitary or phytosanitary protection and is significantly less restrictive to trade."

Accordingly, it is clear that WTO Members are assured of being able to have sanitary and phytosanitary measures that achieve the level of protection they determine to be appropriate. It is also clear that a member is not required to adopt unreasonable S&P measures or to change a measure based on insignificant trade effects. Furthermore, we believe that U.S. sanitary and phytosanitary measures are not more trade-restrictive than required, taking into account technical and economic feasibility. The U.S. does not seek through its sanitary and phytosanitary measures to provide extra trade protection.

CONCLUSION

We live in an interdependent world with a globalized economy.

Trade now represents over a quarter of our economy. In 1992, over 7 million workers in the U.S. owed their jobs to merchandise exports, and an additional 3.5 million owed their jobs to exports of services. On average, every billion dollars of merchandise trade exports results in 16-17 thousand new jobs here at home; jobs that pay, on average, 17 percent higher than the U.S. average wage.

As a mature economy, our future growth, and our ability to create high wage jobs, is linked to our ability to open markets and expand trade. We must continue to reduce trade barriers in our historic trading partners such as Europe and Japan, and we must open markets and expand trade in dynamic emerging economies in Asia and Latin America. The Uruguay Round creates a foundation for doing that. It makes trade a two-way street, while fostering growth here at home, and around the world.

From time to time, we will get into disputes with other countries. They will challenge our trade practices and we will challenge theirs. But that does not mean we lose our sovereignty. It does mean that we need a strong, effective and fair dispute settlement process.

We must ask ourselves this question: Will we engage in the world, or will we withdraw behind walls of fear? Rejecting the Uruguay Round would end fifty years of the United States leading global growth through expanded trade, and deprive U.S. workers and companies of vast economic opportunities. Embracing the Round means the United States leads the world on a path of increased prosperity into the next century. And the nations that join the WTO -- especially the United States -- will reap the benefits of the global economy, without losing sovereignty. Thank you very much.

Acting Chairman GIBBONS. Well, thank you, Mr. Ambassador. As I was listening to you here, I am impressed more and more with your background, your skill, your knowledge, your practical experience of running a presidential campaign, and your skill as a world negotiator. It is amazing. And we are very lucky to have you.

Ambassador KANTOR. Thank you, that is very kind of you.

Acting Chairman GIBBONS. We had so many fine people in that very, very tough job down there. And I am glad you mentioned them in your statement. It is your conclusion and it is the conclusion of the experts that you cited there that this agreement perhaps enhances U.S. sovereignty, not depreciates it. And that ultimately, all the power, all the sovereign power rests right here in the U.S. Government, in the Congress, in the presidency, and, of course, in the Supreme Court. Is that the proper conclusion to draw from all of this?

Ambassador KANTOR. Absolutely, Mr. Chairman. Thank you very much for those very kind remarks. And much of what we have been able to accomplish are due to the President's leadership and Members of Congress working on a bipartisan basis, and due to your leadership, Mr. Rostenkowski's leadership, Mr. Archer, as we moved forward, and we appreciate it.

Let me make two comments about what you just said. On one hand, the Uruguay round and the WTO are much more protective of U.S. sovereignty than is the current GATT arrangement. The current GATT arrangement, which has been ongoing for 47 years, operates by majority vote. Now, by reasons of practical experience, it is always operated by consensus.

There has not been a situation where the so-called tyranny of the majority has adversely affected U.S. interests. But for the first time now, we have taken that in article 9 and putting that—put that principle of consensus in writing, in effect, in the Uruguay round, and I think that is important to understand.

Second, votes now in the WTO—even procedural votes in the new WTO, will either be required under two-thirds basis, or you have to have even a three-quarters vote to determine whether or not it is a substantive or a procedural consideration. Much more protective than, of course, the GATT arrangement.

Second, I think there is another aspect of sovereignty that goes beyond or at least is different from, constitutional prerogatives and congressional prerogatives, which are critical, of course, in what an administration may or may not want to do. The ability to build a global trading system, to increase our exports, to create jobs and to raise wages and to raise our standard of living and to create capital for our companies to compete in this globalized economy, not only protects our sovereignty, it enhances it.

I think there is general agreement on this committee and in this Congress as to that principle. What we are trying to do is to ensure as we proceed in that direction, as we build not only a global trading system but regional alliances as well, such as the NAFTA, and as we move toward a more open and expanded trading system in Latin America and with our Asian trading partners, as we enhance our relationships with the European Union, as we address some concerns with the former Soviet States and with Russia itself, that we raise our own standard of living, build jobs here at home, and

protect what is the greatest sovereignty of all, that is, the strength and the economic progress of our country. So I don't think we should forget that as we talk about some of these more detailed aspects of the World Trade Organization and the way it will operate, as we attempt to move to approval this year.

Acting Chairman GIBBONS. Thank you, Mr. Ambassador. I am going to turn the chair over to Mr. Matsui, who is the new acting chairman of our Trade Subcommittee. As you might have imagined, there are a lot of things going on around here and we are working on a two-track system. We have got health care and we have got this all going on at the same time. I will be in and out for the discussion this morning, but I want to commend you, before we go to Mr. Archer, for the excellent job that you have done.

Ambassador KANTOR. Thank you very much, Mr. Chairman. I appreciate it.

Mr. MATSUI [presiding]. Mr. Archer will inquire.

Mr. ARCHER. Thank you, Mr. Chairman.

Mr. Kantor, I also want to compliment you for the bipartisanship that has been involved in all trade matters and trade negotiations that have occurred under your auspices. I think it is one reason we have been as successful as we have been. I could say I wish it could be that way on health care, but in any event, we are moving forward on a bipartisan basis.

As we look down to the rest of the agenda today, we see witnesses on the list who are going to attempt to refute what you said. Can you anticipate the basis on which they will attempt to refute the question of sovereignty and the retention of our sovereignty and why they are wrong?

Ambassador KANTOR. First of all, I wouldn't be audacious enough to try to anticipate all of their arguments. Second, I have great respect for those on both sides of this issue. This is not a question of motives. This is a question of trying to work through a very serious issue.

We believe that whether it is waivers or amendments or nonapplication or the attempt to alter anyone's substantive rights or obligations under the agreement, that the U.S. negotiating team, and it was a team, backed by a bipartisan coalition of Congress and three administrations, were absolutely focused on and committed to ensuring that sovereignty was not adversely affected.

Now, I think to answer your question directly, what will be raised here today is that somehow the United States under the dispute settlement mechanism will be forced to change laws and regulations as a result of an adverse ruling by a panel under this agreement. That just is not correct, Mr. Archer.

I think that is a misinterpretation of the agreement, and there is no international—no country in the world, no observer of this round, no negotiator who has reached that conclusion. No country is forced to change its laws and regulations as a result of the ruling of a dispute settlement panel.

However, if in fact you don't change your laws and regulations if you happen to be on the losing end of a claim by another country, you may be subject to sanctions or retaliation. Frankly, we are subject to sanctions and retaliations today, Mr. Archer. That has not changed and so there is no difference.

What we do have, of course, is a more effective mechanism, and as I said in my testimony, we have used this mechanism, that is, dispute settlement mechanism under the General Agreement on Tariffs and Trade, more than any other country on earth. We have won 80 percent of the time. We have been frequently frustrated because other countries have so-called blocked our ability to implement these rulings. We believe what has been done in this area of dispute settlement is more transparent (closer to how we handle our dispute settlement in this country), but mostly, more important than that, allows us to cross-retaliate in sectors where other countries have major imports into our country and has strict time limits on the actions of these panels, and includes automatic appeal rights.

Second, in terms of the rulemaking or the general operations of the World Trade Organization, some will argue that somehow U.S. rights and obligations can be affected by the tyranny of the majority. Some will liken it to other international institutions.

This is a contract organization, not a charter organization. It does not operate the way in which other international organizations have operated, neither by history nor by what we have agreed to under the Uruguay round. We made certain that our substantive rights and obligations could not be affected unless we agreed to that. Other countries have just as much interest in protecting their sovereignty as we do. They were also concerned about the same question.

So I think you will face this on two fronts, Mr. Archer, at least the criticism. One, in the potential effect on the substantive rights and obligations of the United States, and in the dispute settlement process.

The third area, of course, that will be raised is whether or not we have somehow limited our ability to use our trade laws. We have not. Our trade laws are even more effective under the Uruguay round than they are today because of this new dispute settlement mechanism.

So my answer to those legitimate questions are that we protected U.S. sovereignty, we protected our trade laws, we have a dispute settlement system that works, that is better than what we had done before, and most important, we followed the dictates of the Congress under the 1988 Trade Act. Three administrations have supported the results that we have achieved, and I believe that gives strong credence to what we bring to you today.

Mr. ARCHER. Just very quickly, as a followup. One of the arguments made by one of the witnesses that is going to testify today is that the United States only has one vote in the WTO. The EC will have 13 votes, and potentially influence as many as 15 more votes held by those that want to enter the EC. Developing nations will have up to 80 percent of the votes in the WTO. Clearly we are going to be outnumbered and outvoted, and clearly it is going to be prejudicial to the interests of the United States.

Can you briefly respond?

Ambassador KANTOR. One, the same situation pertains today.

Two, the GATT has always worked by consensus.

Three, article 9 makes it clear that this organization will work by consensus.

Four, as I said before, no substantive right or obligation can be affected unless we agree to it.

And five, no dispute settlement ruling can force the U.S. Congress or the U.S. administration to change any law or regulation unless we wish to.

Mr. ARCHER. Thank you.

Mr. MATSUI. Chairman Rostenkowski will inquire.

Mr. ROSTENKOWSKI. Thank you, Mr. Chairman.

Mr. Ambassador, welcome. It is always nice to have you with us. I think, Mickey, we have come a long way, you as our USTR, and this committee, in somewhat codifying where in trade this country should be directed. I think that you have certainly an idea of how much I feel the USTR should be elevated with respect to international recognition.

I have a great deal of respect for the Department of State, the Department of Defense, and the Department of Commerce, but I think that with the world shrinking as it is, that the USTR and our representative in trade should be principals as opposed to on the same level with those people.

I think that the GATT, the NAFTA, the shrinking world is going to make this more important to us. And I also think that our trade representatives, as in other countries, should be sitting on the right of the President in all negotiations, and that the ultimate decisions should be based on where we are going in commerce and in trade.

And I just want to congratulate you on a job well done. I know that this committee has been quite influential in creating the trade representative, and I also want you to know that as long as I am in government, I am going to see to it that regardless of how appetizing diminishing the importance of the trade representative to another department might be, I will oppose that, because I honestly believe that you are the wave of the future. I think that we should zero in on where we are going in world trade.

Mr. Ambassador, you know I have always been a strong supporter of the Uruguay round negotiations, and believe that the results will benefit without question the U.S. economy, with jobs as well as an international trading system. I share your view that the WTO will not infringe on U.S. sovereignty. I also believe that the WTO and the Uruguay round agreements cannot work effectively for the United States unless the Congress and the Committee on Ways and Means, in particular, are actively and continually involved in their future implementation.

Mr. Ambassador, can you tell us how the administration plans to continue the relationship of consultation and involvement of the Congress and this committee in the implementation of these agreements, particularly when any WTO decisions involve U.S. laws?

Ambassador KANTOR. First of all, I want to thank you personally for your kind remarks and your support for me personally, and obviously for this administration in so many ways.

Second, my children don't believe I am the wave of the future, Mr. Rostenkowski. I am glad you do.

As far as the USTR is concerned, the fact is this President has been tremendously supportive of this office, as you know. This administration, under his leadership, has had a team approach to these increasingly important and difficult problems of trade. The

Secretary of State, Secretary of Commerce, Secretary of Treasury, the Chair of the Council of Economic Advisors, the head of the NEC, the Secretary of Agriculture, could not have been more supportive of what I have tried to do and what we have tried to do together. And so I want to say to you that your strong support for that has been extremely helpful, and has convinced this administration we should operate in that fashion and we have, and I think the results have borne out your strong advocacy for that approach.

As far as operating in a way that we are always connected to the Congress, and in fact cooperative with the Congress, I think that has been historic with this office, Republicans and Democrats. International trade is a province of the Congress of the United States constitutionally, as you know so well. Whenever we have a situation in which we face a problem with the World Trade Organization when it goes into effect, or any international trade problem, I believe it is the obligation of the administration and especially the U.S. Trade Representative to come to this committee, to go to the Senate Finance Committee, to review fully those questions on a bipartisan basis, and to operate on a consensus between us as we approach those problems.

It would be a huge mistake on the part of any administration, frankly, Republican or Democrat, not to operate in that fashion. I believe my predecessors have, and I can tell you that we are fully committed to doing that in the future.

Mr. ROSTENKOWSKI. Well, Mr. Ambassador, let me just end my portion of this dialog with pointing out that Carla Hills before you, and you following in her footsteps, I know of no trade representative that has participated, that has counseled Congress more than you and Carla Hills. And I think that cooperation is the reason why you bear fruit from the membership in this legislative process.

Your consultation with us, your concern, and the fact that you recognize that we all represent different points of view, but in the consolidation of those thoughts I think that has made you a very effective USTR, as Carla Hills before you. And I want to tell you that I am not only suggesting to the present President of the United States, but also did to the two Presidents that preceded him, George Bush and Ronald Reagan, the importance of the U.S. Trade Representative. And I think as long as I am in government, I will continue to feel that way.

Thank you very much, Mr. Ambassador.

Ambassador KANTOR. Thank you, sir, appreciate it.

Mr. MATSUI. Thank you, Mr. Chairman.

Mr. Shaw will inquire.

Mr. SHAW. Thank you, Mr. Chairman. I would like to associate myself with the remarks of Mr. Rostenkowski. As a Republican, we have been very comfortable dealing with you and have certainly admired your skills. I quite frankly was wondering who in the world would fill the shoes of Carla Hills, but you have certainly brought a great continuity to the job and it is a great tradition, something I think all of us can be very proud of. I would like to yield at this time to Mr. Gingrich of Georgia.

Mr. GINGRICH. Thank you, Mr. Shaw.

I want to thank Mr. Matsui for allowing this hearing to happen. I also want to associate myself with what Mr. Rostenkowski said.

I think that the elevation of the USTR so it is clearly the preeminent representative of the President on all issues relating to trade is an important step, and I must say that when we worked with you last year on the NAFTA and when Chairman Rostenkowski, Mr. Gibbons, and Mr. Matsui in a bipartisan way with Mr. Archer and Mr. Shaw and others, it was truly a bipartisan effort to expand the world market. I think that is the spirit with which we are approaching this hearing today.

I think you have been a very energetic and intelligent representative of that viewpoint, both to the world and also, frankly, to the administration. I have enjoyed working with you on a bipartisan basis, but I do have four or five questions I would like to get to fairly quickly if I can. I realize I am here at the indulgence of the committee and for that, I am very grateful.

First of all, let me draw a clear distinction so we don't waste energy on a false statement. There is no de jure surrender of sovereignty in this agreement. The question I raised about 7 weeks ago is a question of de facto surrender of sovereignty.

That is, if a government is determined to behave as though it is subordinate to an organization, it has in effect surrendered to that organization a capacity to define itself. So you can have a de facto surrender of behavior.

Bosnia, for example, where the President's consistent statement is he would like to lift the arms embargo but the United Nations won't let him, is not in fact legally a surrender of sovereignty, but the functional effect is to have dropped your rights as a sovereign nation.

Now, I have raised two sets of questions about this agreement. One is whether it is, in fact, transformational agreement. You made a reference earlier to "the current GATT arrangement." The fact is, as you know, the GATT arrangement was never ratified by Congress. There is no GATT arrangement. The reason it is consensual is we don't actually belong to it unless we want to. So we could walk off any morning.

We haven't, in fact—we have twice before refused in Congress to do what you are now asking us to do. So it is important historically to place it correctly, as to whether or not this is a transformational vote.

The second is the administration's intention. Now, I think there are basically a couple of questions I want to ask you. The first is to what extent can the World Trade Organization be changed without congressional approval?

If, for example, the World Trade Organization, with the vote of the United States or against the vote of the United States, but let's say with the approval of the executive branch, if the executive branch agreed to change it, as you understand the implementing language you are drafting, would those changes in any way have to come to the Congress for ratification, or could the executive branch agree to change the World Trade Organization without any opportunity for Congress to intervene as it is currently being crafted?

Ambassador KANTOR. As I understand the implementation legislation, the statement of administrative action, and its connection to the Uruguay round agreement, Mr. Gingrich, any administration

would have to come to the Congress if any right or obligation of a substantive type were attempted to be changed by the WTO, and the administration in question, Republican or Democrat, would want to change it. That is not only my understanding, I think that is absolutely clear.

Mr. GINGRICH. And you would feel comfortable to make sure that as we draft the implementing language and as this committee, which of course will play the decisive role, works with you in ensuring that language, there is an explicit requirement that not only——

Ambassador KANTOR. Not only would I agree to that, I would support it and advocate it. I think it would be, frankly, on a legal basis, the right thing to do, and constitutionally proper. But more important, on a practical basis, I can't imagine this administration not wanting to come to the Congress, or any succeeding administration——

Mr. GINGRICH. I am worried about future administrations.

Ambassador KANTOR [continuing]. In order to continue to build a bipartisan trade policy and one in which the administration and Congress are in concert.

Mr. GINGRICH. And would you have any qualms if, for example, it was modeled a little bit along the line of the independent counsel law, that not only would the administration make that determination, but upon report by the administration, that if, say, a majority of either the full Ways and Means Committee or a majority of either the minority or majority felt that this was an infringement, that at that point it would be reported to the Congress?

I am trying to build on a series of steps so you don't have an executive branch decision that says, again, not in your administration but in the future, that says, we have agreed to this and we are telling you, the Congress, this isn't a real change. There has to be some mechanism, and we can work out the details by which the Congress could independently assert its right to vote on that particular change.

Ambassador KANTOR. I think one thing we might be able to draft, and I certainly would be willing to look at, would be some periodic reporting process where the administration or any succeeding administration would have to come back to this committee or the Finance Committee on the Senate side, I think would be the most appropriate committees, but it wouldn't have to be regulated only to those committees, and give a full and complete report as to the decisions of the WTO which in any way affected the substantive rights or obligations of the United States.

Mr. GINGRICH. Second, one of the reasons I raised concerns about the WTO is that I read the Vice President's eloquent speech at Marrakesh in which he talks at length about world labor standards and world environmental standards. I wonder if you could clarify the administration's intentions about whether or not it sees the World Trade Organization as a primary opportunity to expand labor and environmental standards? In what ways could we ensure that that not happen if the Congress were not in agreement?

Ambassador KANTOR. First of all, let's make sure that I properly articulate what the Vice President said. One thing I have never done is misquote my fellow Tennessean.

The fact is that the Vice President made it clear that the addressing of the intersection of internationally recognized labor standards and trade or environmental standards and trade should not become an excuse or a reason for new protectionism or protectionism in any form or guise. He made that absolutely clear and precise in his speech. That is No. 1.

No. 2, what the Vice President was recognizing in his speech and which has, frankly, been a position taken by the U.S. Government under both Republican and Democrat administrations is that the intersection of these concerns, especially in the labor standards area, has been historic, starting in 1953 with the Eisenhower administration.

I know, Mr. Gingrich, you are quite familiar with the Treaty of Versailles and the language of intersecting labor and trade, with the 1948 Havana Charter which is cited in the GATT, which I understand has not been ratified by this Congress but is cited.

Mr. GINGRICH. Partially because of those citations.

Ambassador KANTOR. Right. No. 3, I know you are quite familiar with the Eisenhower administration's advocacy of labor standards and trade, the Carter administration on the Tokyo round attempting to do the same, the Reagan administration attempting to do the same, the Bush administration attempting to do the same.

Now, this administration followed the precedents set by Republicans and Democrats and pursued these matters successfully. That success is established by creation of a Trade Environment Committee in the new WTO which would discuss how, in effect, the environmental issues affect trade and trade affects the environmental and conservation issues and how we are going to address them in the future. That is an important step forward, but that is what it is.

Mr. GINGRICH. But would you agree that at least at the margins it is a transformational step, because it does involve the GATT Secretariat in a different set of questions than the narrowly trade-oriented set that have historically been there?

Ambassador KANTOR. Each step we make toward protecting intellectual property, bringing services under the Uruguay round and approved dispute settlement mechanism, making sure we get rid of nontariff barriers by a process of tariffication in the Uruguay round, minimum and current access in agriculture, lowering tariffs around the world by 40 percent, is a transformational step.

Mr. GINGRICH. But in each of those cases they are building on a trade-oriented set of decisions and expanding the zone of trade. They are not asking new and inherently political questions that may have an effect on trade. My only point here is that difference.

Ambassador KANTOR. I understand. Many countries in the world saw the coverage of intellectual property rights under the Uruguay round—and I know Julius Katz is sitting here—as an inherently political question. What they saw was that we were trying to bring to the Uruguay round something they didn't want to address, and it was extremely critical to them in their internal politics.

Now, we were successful in doing that, and it is, of course, important to our economic future that those rights be protected. And so beginning to address other concerns such as the legitimate inter-

section of labor standards and trade or environment and trade will only help enhance a world trading system, not detract from it.

Mr. GINGRICH. Let me just—as an aside for 1 second, if a country challenges a State law rather than a Federal law and takes the State to the World Trade Organization—the Minnesota beer case is a minor example—who would represent the State in that setting? If—the State of Georgia, for example, in my case?

Ambassador KANTOR. Well, the U.S. Government would.

Mr. GINGRICH. Would that be automatic?

Ambassador KANTOR. Oh, absolutely. That would be——

Mr. GINGRICH. OK. I think that is important.

Last, let me walk you through a hypothetical example which is in the Post today in the business section, in an article entitled, "Trade Case Poses Threat to Environmental Law, GATT, Europeans Challenge Gasoline Consumption Standard as Unfair to Their Auto Sales."

I just want to understand in your own mind how the new World Trade Organization will work. Let's say that the United States—and I know you can argue aggressively that we will win this case, and I am not asking you to in any way concede that we would lose it. But, as a way of understanding a model, if the United States were to have the CAFE standard judged unacceptable under the GATT, in the current system, the United States can simply, in effect, veto that decision and say, "tough break." We don't agree. We are going to continue to oppose it.

As I understand it under the new model, if that decision were found and the European countries won the case, they could now through the dispute mechanism, ask for compensation for the American behavior, and, at that point, we would have a choice of either changing our law or paying the compensation as an extra fee in order to maintain our law.

Now, that is not a loss since this is a legitimate partnership agreement. But it is a partnership agreement in which we are transferring to an intermediate agency a capacity to coerce us economically as an alternative to changing our behavior. Is that a fair summary? I am not saying it is bad, I am trying to understand.

Ambassador KANTOR. And you said it—and I appreciate that we don't concede that, of course, this case is going to be lost, so to speak. We believe that we provided full national treatment to European carmakers and that just because these laws may have a disproportionate impact on their carmakers who make more luxury cars proportionately than other carmakers from other countries or our U.S. companies would not constitute a GATT violation, and we feel that very strongly.

That is No. 1. I just want to make sure for the record that is there.

No. 2, you are correct to the extent that we can't block, so to speak, under the new dispute settlement mechanism of the World Trade Organization. However, no decision—this decision, if it were taken under the new arrangement, forces any administration and the Congress to change any law or regulation of the United States.

Now, we have two choices at that point if we do not wish to change our law or regulations. One, of course, is to negotiate with

the complaining party in order to reach a common solution, and that happens, as you know, quite often in these situations.

No. 2 would be, of course, to be subject to trade sanctions only up to and including the amount of the damage. It can't go above that.

Now, you can—not you, others might say that is the problem here, but we have submitted ourselves to a problem where we can, in fact, have to pay compensation due to a ruling by a body of an international organization.

But let me say this again. There is a reality here. One, we are the largest trading nation in the world by far. We are the largest economy of any one country in the world by far. We are the central and pivotal point of the largest free trade zone in the world, the NAFTA, by far.

It is only common sense to understand the reason the GATT is operated by consensus, Mr. Gingrich, as you know, and the reason it has been so successful, is that countries will be quite reluctant to run the risk of closing themselves off from our markets by using these procedures in a way that would be adverse to their interests and our interests. That is No. 1. So there is a practical reality.

The second point is, countries will, I think—will want to reach a solution by negotiation rather than by invoking sanctions because of point No. 1.

No. 3 is, we have a history of winning these cases in the GATT. We are the ones that were the most adversely affected by the old rules. We, under three administrations, have followed what the Congress has asked us to do and said come back with a system that gets rid of this blocking mechanism in order in fact that we can assert our rights in an international organization to increase and expand our ability to effect world markets.

Mr. GINGRICH. My closing point—let me make one last observation and get you to comment on it, and I will make it in two parts.

My first point would be that we are, in fact, transferring power to this new partnership in a way that it has not been transferred before. And that one of the things people just need to be aware of is, for example, the European common market, as I understand the rules—and I am not saying they will do this, but take this example and correct me if I am wrong—that you could make a decision that if you win the case and the compensation is $700 million a year that for the period that the Congress fails to change the law you could take that compensation say in the form of higher tariffs in American agriculture or in Boeing aircraft. In other words, it is not the offender—it is not the offending industry or the offending sector that necessarily ends up with the compensating payments.

And so, in a sense, all of the exporting companies are potentially at risk, because they are the only people who pay for it.

Ambassador KANTOR. Well, that is theoretical. The fact is——

Mr. GINGRICH. But isn't that how the mechanism would work?

Ambassador KANTOR. Well, no, not really. If, in the area we have exports, in that area which can be affected, the sector that you are talking about, theoretically, that has been the subject of the adverse subject after dispute settlement decision, then, of course, the country would be forced to operate in that sector. It is only when there is not enough trade in that sector that you can use your

cross-retaliation rights. And, in fact, that has to be sanctioned by the dispute settlement panel as well.

What you do in terms of these sanctions you impose, and as I said——

Mr. GINGRICH. So their reaction would be against American auto exports, would be the first stage?

Ambassador KANTOR. Of course.

Mr. GINGRICH. OK. My last comment—I realize you can't offer this list since, by definition, you will intensely argue that none of our laws are GATT violative, because you are going to be the one that protects them. But I am going to ask the committee to see if there is a way to get an outside study that just gives us an early warning indicator of where cases might be made against American law.

I agree with you. On balance, at the present time, we are clearly the most aggressively pro free trade, large economy in the world. And, at the present time we would clearly be more likely to file cases than have cases filed.

My concerns are twofold. One, that it is a transfer of power within a partnership framework and we should be aware of that. And the other is that I think we should be aware in the Congress of what laws we might have to pay for maintaining.

I realize that you can't really be involved in that because—well, that would be for you to imply that we ought to lose the cases.

I am going to see if there is a way to get some outside studies done, just to make sure that we understand that by this new agreement we are setting up a mechanism, whether it is sugar or whether it is something else.

I just think we need to know in advance what risks we are going to run as a Congress and recognize that we in the Congress are now going to vote to allow a multinational body, which we are part of for our own purposes, to, on occasion sanction increased costs against America for a law which the Congress may have passed. And then Congress can decide, do we repeal the law or do we accept the sanctions? Or, in theory and, under a very weird circumstance, would we withdraw?

But I don't think, as a practical matter, we can ever withdraw from this organization unless it became grotesque. As a practical matter, we are in the world market. We want to be there, and we would not want to cause the chaos that would be implied by withdrawal once it was established.

That is my final comment. I appreciate you being here.

Ambassador KANTOR. Just to react to that, the Uruguay round agreement—and I think we agree on this totally—is really designed to take advantage of our strengths as a nation, whether it is in the agriculture, industrial products, intellectual property, services. This dispute settlement mechanism will in most cases work to our advantage.

There will be times when we will lose a case. That will inevitably happen. The question is not whether you lose a case and what kind of effect that has. The question is, do we have to do anything which would adversely affect our sovereignty as a result of that? The answer to that is clearly, no, as you began your discussion.

You also raise the issue of whether, de facto, we would give up our sovereignty. Frankly, with or without this agreement, some administration—and I can't imagine why—might want to or might act in a way that would adversely affect U.S. sovereignty on a de facto basis.

I think that you can look at this administration and how we have reacted in trade on a bipartisan basis, promoted our trade laws and enforced them, enforced our trade treaties, made sure that the agreements that we entered into, whether it is the NAFTA or the procurement agreement with Europe, which is the largest government procurement agreement in world history, or even in the Uruguay round negotiations, we acted in a way to try to protect not only U.S. sovereignty, but U.S. interests.

I think that is something we have all agreed on on a bipartisan basis. I can't imagine a Republican or Democratic President of the United States and anyone in their administration ever in the future doing anything different than that. It is just so critical to the future of our country.

So I understand. The questions are legitimate, they are well-raised, and I appreciate them. But I think, by raising them, I think we answered the question clearly and loudly. U.S. sovereignty is protected, and this agreement is in the best interests of the country.

Mr. GINGRICH. I want to thank you very much for your energetic and intelligent leadership.

I want to thank Chairman Rostenkowski for originally setting this up, and thank Chairman Matsui for allowing me to participate. I think this is a bipartisan effort to maintain and promote trade which is in the interests of America because we create more local jobs through world sales than any other country in the world.

I appreciate you being here. Thank you very much.

Mr. MATSUI. And we want to thank you, also, Mr. Gingrich, for your participation today. Thank you.

I would like to now call on Mr. Kleczka for his inquiry.

Mr. KLECZKA. Thank you, Mr. Chairman.

Mr. Ambassador, I have two short questions relating to the WTO. First, there has been some concern raised by the openness or lack of openness of the meetings and the decisionmaking. Could you address that for the committee?

And, also, what is the effect of the WTO on the current 301? Is it out the window? Or is it still effective and a tool that we can use for trading partners who are violative?

Ambassador KANTOR. Thank you very much, sir. Both are very important questions.

No. 1, the United States has taken and is taking a very strong position that in the proceedings of the GATT Council's ministerial meetings, which are not negotiations and should be held in public—nongovernmental organizations should be allowed to participate—and that they should be as transparent as possible. This has not been the way the GATT has operated in the past.

No. 2, on the dispute settlement, the United States has taken the position that the operation of these panels which take evidence and have their discussions in private don't allow for the public to watch what they do, don't allow for nongovernmental organizations to

even file amicus briefs as we would term it in this country—frankly, don't even allow countries to disclose information and try to stop countries from making briefs that are filed by nations, whether it is the United States or others from becoming public—is antithetical to all we believe in as a nation.

I have written Director General Sutherland, using the tuna/dolphin dispute as a mechanism, to say we want the GATT Council consideration of the panel decision to be in public, to allow the participation of nongovernmental organizations. We have made all briefs filed by every nation, including the United States in this proceeding, public, and we will continue to do that. This administration is absolutely committed to making sure, to the extent possible and appropriate, that these proceedings of the WTO are open to, as someone said earlier, open to the sunshine. That is No. 1.

No. 2, our trade laws are preserved under this agreement. We have always, or at least since 1979, had to go to the GATT if we had a GATT-covered country and a GATT-covered item. We are forced to use the dispute—under congressional—under the 301 law. What we have done, though, by that is, first, we preserved our right to act unilaterally if it is not a GATT-covered country or a WTO-covered country or an item under the new Uruguay round or both.

Mr. KLECZKA. Which is not covered.

Ambassador KANTOR. But, second—so we can act unilaterally in those cases. But, second, with a new dispute settlement mechanism that actually works, 301 is even more effective. Since we are already forced to use a mechanism, meaning the GATT mechanism under 301, when it is a GATT-covered item or GATT-covered country, to have a better mechanism that has strict time limits, right of appeal, cross-retaliation, transparency, puts us in much better shape in terms of our ability to enforce our trade laws.

Mr. KLECZKA. Let me go back to the opening. You indicated that you requested of somebody the fact that all of these documents and the proceedings be in public. What has been the response?

Ambassador KANTOR. Well, I haven't had a response from Director General Sutherland yet. This is quite a recent undertaking. The fact is that we are going to work in the preparatory committee of the World Trade Organization, which will be meeting, in late June and late July are the next two meetings, in the various subcommittees to try to open up the processes of the new World Trade Organization in just the way I articulated to you earlier.

Mr. KLECZKA. Now would that be the proper subject for the implementing legislation that this committee will be dealing with?

Ambassador KANTOR. The fact is, it would be. The fact is that, obviously, anything is a proper subject, frankly.

Mr. KLECZKA. Well, as long as it doesn't violate the agreement.

Ambassador KANTOR. The agreement, frankly, is largely silent as to process. It is interesting. I think we have wide discretion to seek open rules, open procedures, due process, if you will, in the World Trade Organization proceedings, and we will. We would be pleased to work with you and other members of the committee on both sides in order to try to achieve that goal.

Mr. KLECZKA. OK. In fact, I would also ask that you and your staff work with members of the committee who are interested in this subject matter so that can be part of the legislation.

Ambassador KANTOR. Absolutely. I think, frankly, the ability to open up these proceedings will build more credibility in the organization and, in fact, will make us more comfortable not only here in Congress and the administration but the American people with the decisions of the organization. I think it is in the best interests of multilateral trade regimes that you have due process and openness and transparency.

Mr. KLECZKA. All right. Thank you, Mr. Ambassador.

Ambassador KANTOR. Thank you, sir.

Mr. MATSUI. Thank you, Mr. Kleczka.

Mrs. Kennelly will inquire.

Mrs. KENNELLY. Thank you.

And good morning, Mr. Ambassador. I notice on page 2 you speak about the WTO development of rules of procedure for all its bodies, and the question of access is alluded to. You and I have discussed access in dispute settlements previously, and I would like to just continue that discussion this morning.

When you have a dispute proceeding as they are presently handled, what happens is, in a 301 process, documents submitted to the procedures are—I guess they are called limited, and as you know, that is a low level of confidentiality. As a result, when private parties are involved, they cannot get access to these documents.

Now, foreign parties are very, very free to disperse these documents to the people that want to see it. As a result, some individuals that really are impacted by the dispute have much more information than those that are involved on our side in the dispute.

And my argument to you, Mr. Ambassador, and one I continue to feel that we have to address, is that these are the people on our—you have to say our side, the United States of America, the people that are involved in this dispute. These are the people that make the product, they price the product, they sell the product, and they can't get access to the information.

So I would hope that as we keep looking at this document and we try to improve this document, some measure would be made available to the parties most interested—those are the ones we as a government should be most interested in—we should want that information disbursed to these people because they have the information that could help you and your people argue the case in favor of the United States.

So is there a way that we can address this so that at least we have a level playingfield regarding information for our parties who are involved within 301s?

Ambassador KANTOR. Absolutely.

No. 1, as a matter of policy, we have not only released documents—all the documents in the so-called tuna/dolphin case, we will continue to follow that policy in the future.

No. 2, as you know, the USTR, the office of the USTR, under every administration has worked closely with private industry in fashioning our responses to or advocacy of our positions in front of these dispute settlement panels.

But, No. 3, it is extremely important we not only advocate but we are successful in opening up these panel proceedings—not the actual deliberations or the decision by the panel members, I think, like a court or an administrative tribunal when they are actually making a decision or among themselves. That is probably properly confidential. But not when they are taking evidence or discussing the matter and the facts in general.

So, one, that ought to be opened up to the public.

No. 2, they ought to allow for nongovernmental organizations, whether it be private businesses or labor or other groups, to participate as well through filing of briefs or filing of documents or memoranda or even of evidence.

No. 3, I think they ought to allow, if a panel requests it and allows it, for these organizations to appear, which may or may not take the same position as the United States, even though they may be U.S. organizations. I think that is important.

No. 4, of course, the decisions themselves should be made public immediately.

And, No. 5, the appeals proceedings ought to follow the same pattern.

So you and I have no disagreement about this. This administration will attempt in every way possible to open up these proceedings to the sunshine—not only dispute settlement but the normal day-to-day proceedings of the World Trade Organization itself. That has not been the case, of course, under the GATT.

Mrs. KENNELLY. So—Mr. Ambassador, so we are clear on this.

No. 3, you said that the private parties or interested parties or those involved should be free to appear. And that goes right to the heart of my concern. Under the new WTO, private parties, when they go to get that information, they won't get in front of a bureaucrat and be told this is limited information, and that they can't have this information. It doesn't help you to be able to argue if you don't have all of the information.

And so we are saying then that you will have freedom of information, more or less.

Ambassador KANTOR. We are going to make that information available.

Mrs. KENNELLY. Thank you, Mr. Ambassador.

Mr. MATSUI. Mr. Bunning.

Mr. BUNNING. Thank you.

Welcome, Mr. Ambassador. How would you respond to concerns about the system of checks and balances in the World Trade Organization when, in most cases, a decision made under the World Trade Organization requires a greater majority to be approved than under the old GATT regime?

Let me give you an example. To waive obligations of a member country requires a three-quarters vote of the members rather than the two-thirds vote required under the old GATT. Changes to decisionmaking and dispute settlements require a unanimous vote of all members rather than a two-thirds majority vote of all members. How are we ever going to get a unanimous vote?

Ambassador KANTOR. Well, in fact, we have been able to get consensus in the World Trade Organization—and these provisions are

very protective of our sovereignty. That is exactly what I have been saying, Mr. Bunning.

The fact is that under waivers you have to get consensus to grant a waiver of obligation subject to a transition period or stage implementation. That means no country can have its obligations waived which we do not want to happen unless every country agrees to it. This is important to us. Let me explain why.

We have undertaken all of the obligations of the World Trade Organization in the Uruguay round, all of them. Developing nations have a 10-year period of transition. We don't want those countries waiving their obligations because we want them to implement intellectual property rights protection, to protect services, to open up current and minimum access to agriculture, to get with the nontariff barriers in that area as well, to bind their tariffs and to lower them. So they—under this agreement, unless there is a consensus, they can't waive those obligations.

That is what is critical. We operate by consensus. That is protective of our sovereignty and the obligations and agreements we have reached in this World Trade Organization document—or the Uruguay round document—I am sorry, I should say.

Mr. BUNNING. Well, it seems almost impossible that you can get a unanimous vote of all members to waive any changes in the decisionmaking and dispute settlement rules, particularly for those that might have some other problem with the United States, whether it be in trade or some other foreign policy problem.

Ambassador KANTOR. It is interesting, Mr. Bunning. In order to develop a trade and environment committee or have even the discussion of labor standards in the new preparatory committee, we needed consensus. In other words, no one could object. We were able to achieve that. The GATT operates, frankly, every day by consensus.

Frankly, the leadership of the United States in this area has been critical to the building of this consensus, and we need to continue that. We are, in fact, committed to operating by consensus because it is so protective of our sovereignty. We don't want others in effect, as Mr. Gingrich was talking about, outvoting us, so to speak, in areas so critical like waivers, like changes in our substantive rights and obligations.

So, therefore, this administration's position, and I think the position of many members up here is—and many outside observers—is the requirement to operate by consensus is in the best interests of the United States.

Mr. BUNNING. Let me ask you the question in regards to something that the Acting Chairman brought up. He said that we ought to have implementation and some kind of basic agreement by the end of June as far as implementing legislation. Is the administration prepared now or have they been prepared, now or in the future to pay for, under the unfortunate static model, the implementation of the GATT?

Ambassador KANTOR. Director Panetta is having meetings both this weekend and early next week with Republicans and Democrats in both the House and Senate to address this problem.

We believe we made great progress in this area. We want this to be a bipartisan solution. We believe it is possible, if not probable,

we will get there in the very near future. We hope—we will not, though, move on simply a Democratic or Republican basis. We think this requires a bipartisan——

Mr. BUNNING. What I am trying to ask you is, without a waiver, do you plan to pay for it.

Ambassador KANTOR. Yes, we actually want to pay for it. And we, of course, have been committed in the past and will continue to be committed to, of course, have the program offset any increases in fees.

Mr. BUNNING. Well, if we could get a dynamic model—obviously, it would be better for both the agreement and working with a lot of other legislation where we have to get that kind of an agreement, if we could get it started with this negotiation and on down the line in future negotiations.

I thank you, Mr. Ambassador.

Ambassador KANTOR. Thank you, sir.

Mr. MATSUI. Mr. McDermott.

Mr. MCDERMOTT. Thank you, Mr. Chairman.

Mr. Ambassador, we all have to go home and run for reelection, and obviously this World Trade Organization has for me the same feel as the United Nations has had. This country has had kind of a mixed reaction to the United Nations. We didn't want to pay our bills. We have sort of dipped and dodged around. But when it is useful, like in the Iraq war situation, why then we want to go in and get it all to work for us. So there is a kind of mixed reaction in the public about the United Nations.

When you look at the World Trade Organization, it looks a lot like the General Assembly in that one country, one vote, and that is troublesome because of the difficulty of the United Nations in producing a consensus opinion.

One of the questions I really struggle with in my thinking about this—I come from an agricultural State. We export lots of goods from the agricultural sector, and if the United States has an environmental law that is inconsistent with GATT and the U.S. Congress decides to uphold that or maintain that environmental law, the complaining country has the right to force a case in the WTO and ask for sanctions against the United States. So if we keep out something that has a certain pesticide used on it or whatever, we get into this kind of problem.

Now, how is the complaining country restricted in its choice of the kind of sanctions or the products that they can retaliate against? Can you lay that out? Because I am going to meet my environmental community as sure as I am sitting here on this issue.

Ambassador KANTOR. First of all, this agreement is the most protective multilateral agreement in history in terms of the environment. Our negotiators went to great lengths to make absolutely clear in the agreement that governments are free to establish their own levels of protection for health, and they are not under any pressure to lower their standards. We can maintain more stringent standards at the Federal and State level, frankly, than the international standards. That is No. 1.

No. 2, it also, though, protects us and your agriculture industry in the State of Washington in that those standards are not based on a scientific basis which are used to protect the markets of other

countries, such as the apple situation in Japan where we negotiated, as you know, for 23 years, and, thank goodness, we are finally getting apples in, finally, finally, this year.

Mr. McDERMOTT. You understand my concern.

Ambassador KANTOR. Right. The fact is that this will be helpful in this regard.

On the one hand, we can protect our laws; on the other hand, nonscientific-based regulations merely employed to keep products out of a market can be addressed and addressed effectively. This, I think, is one of the bigger triumphs that our negotiators from three administrations reached, and I think it is an important step forward.

But let me mention No. 2 in terms of the analogy to other international organizations. I think that it is quite important to dispel any concerns in that regard.

Although it is a one-vote-per-country situation, we have to operate by the Uruguay round agreement by consensus in critical areas, as I have just been talking about with Mr. Bunning. When you operate by consensus that means the tyranny of a majority cannot rule.

No. 2, in dispute settlement, even if we happen to lose a case—and in most situations, because the United States adheres to its international obligations, we have the largest open market in the world—the fact is we are not going to be subject to an adverse ruling. The fact is, even if we are, we don't have to change any law or regulation as a result of that. We are not forced to do so. Our sovereignty is protected.

The tyranny of the majority cannot rule our substantive rights and obligations, and, in fact, this agreement plays to all the strengths of the United States.

Let me just talk about agriculture for 1 second, because I know it is so important to you and your State, as it is to most States in our Nation.

In the next 8 or 9 years we will add about $8 billion in income in our agriculture community strictly as a result of the Uruguay round through increased exports. Because we went to a tariffication procedure which all have agreed to and have gotten rid of the nontariff barriers and will lower then the tariffs as a result, we will have increased access.

In addition, we have now a minimum current access requirement. For instance, we now can get rice into Japan and into Korea, which we have never been able to do. So as we proceed forward, agriculture in fact is a big winner, one of the biggest winners in this whole round, because of tariffication and minimum current access.

So, therefore, I would indicate that we can protect our health and safety laws on the one hand, we can open up the markets on the other, and we will have more access, No. 3.

Mr. McDERMOTT. Thank you. Thank you, Mr. Chairman.

Mr. MATSUI. Mr. Neal will inquire.

Mr. NEAL. Thank you very much, Mr. Chairman.

I apologize to Mr. Kantor for running in and out.

I just have a couple of quick questions in the area of sanctions. I think there is an unspoken fear here that section 301 is being

weakened, and I guess my question to you is, how can you assure the members of this committee that we have the necessary leverage down the road to ensure that America's interests are protected?

Ambassador KANTOR. I think one would be the reaction of the European Union and others that they are deeply concerned that, in fact, our section 301 of the trade laws have been strengthened, not weakened, by this agreement. Nothing in this agreement requires us to alter in any way section 301 except that the time limit for investigation has to go from 12 to 18 months. That is all we have to change.

No. 2, because the dispute settlement mechanism, I said before, is much more effective and because section 301 requires us to use that mechanism when it is a WTO-covered item or country—and country, an effective mechanism makes 301 even more effective as a trade law.

No. 3, if the item is either not covered by the Uruguay round or the country is not a member of the WTO, we can use our 301—section 301 unilaterally. So, therefore, nothing has changed with regard to 301.

Mr. NEAL. Let me just raise this as kind of a personal reflection.

My sense is that, as Mr. Rostenkowski and others have said, that it is my belief that you have done a great job in your capacity as Ambassador. But there is a suspicion here, whether it is MFN with China or recent news accounts over the last few days, as to the measures we were going to take against Japan 6 months ago have now kind of fallen by the wayside and that we tend to say one thing and when push gets to shove we tend to do something else. And maybe you could in broad terms speak to that. I won't tie you to anything specific this morning.

Ambassador KANTOR. Let me speak in narrow terms, only half in jest. I was in Paris for a number of meetings, including the OECD meeting, just came back about 36 hours ago. While there, picked up two newspapers which I won't mention. One said the United States may be going soft on Japan. The other says, U.S. harsh approach to Japan affecting currency markets. Now, I am not sure exactly who I am. I am a bit schizophrenic at this point.

Mr. NEAL. We all are.

Ambassador KANTOR. The fact is, neither our approach, our rhetoric, our intention, the use of our trade laws or our commitment to the framework that we reached with Japan has changed 1 inch. We continue to pursue the same objectives. We will pursue them in the same way.

The President said it best last year when he said we will act multilaterally where available, regionally where necessary and bilaterally where we need to get results if we can't in any other way.

Mr. NEAL. So the recent news accounts that we have reached stalemate and now find that it would be harmful to U.S. trade prospects to retaliate against Japan are not to be believed?

Ambassador KANTOR. I couldn't—let me be very explicit. We reached a framework agreement in July, 1993, with Japan. On February 11, 1994, the President said we would not be satisfied with either cosmetic agreements or paper over our differences. We wanted agreements that worked. And that meant we needed objective criteria, quantitative and qualitative, and also we needed goals

for each of the sectors and also a macroeconomic stimulus by Japan that actually would build their economy and lead global growth.

We have now reengaged these framework talks. We have had our officials in Japan for the last 10 days. We will go back on Monday and go back the next week after that. We are trying to make progress. But we are going to open up Japanese markets to foreign competitive goods one way or the other.

The failure of Japan to open its market, the failure of Japan to import manufactured goods at the rate of other industrialized countries, in fact maintaining the most closed markets in the world has had an adverse effect upon the world trading community. The United States negotiating on a multilateral basis, that is, trying to open these markets for foreign competitive products, not just U.S. products, has taken the position that we will act one way or the other.

Now, we want the framework to operate successfully, and we are committed to it. But we will also be careful to enforce our trade laws. Even during the process of this framework, you remember, we invoked sanctions in the construction area and government procurement and then got an agreement. We invoked sanctions in the area of cellular telephones and then were able to obtain an agreement with the Japanese. So we have not hesitated to use our trade laws as we have pursued the framework. There is nothing inconsistent with that position.

Mr. NEAL. As you know, for those of us who represent the old manufacturing areas of the country that bilateral trade relationship hovers over everything that you try to do in trade every single day. And the people that I represent tend to believe that we say one thing and we do something else. So I am happy to hear you take an assertive position this morning.

Ambassador KANTOR. We have reached more agreements with the Japanese in terms of opening their markets in the last 11 months than any time in American history.

Mr. NEAL. We are doing great with convertible Mustangs, I know that. But we will have to wait for other results.

I thank you, Mr. Ambassador.

Ambassador KANTOR. Thank you, sir.

Mr. MATSUI. Mr. Levin will inquire.

Mr. LEVIN. Thank you very much.

Welcome. Let me just ask you, on page 6 it stated that the Uruguay round will not impair the effective enforcement of U.S. trade laws, especially section 301 and our antidumping and countervailing duty laws. I take it, Ambassador Kantor, that that statement and your elaboration of it doesn't imply that it would be wrong for us in the Congress working with the administration to take steps in the implementation agreement to assure and if possible enhance further the effectiveness of those trade laws?

Ambassador KANTOR. I don't think I have ever taken the position that anything this Congress does is wrong nor will I today. I might try to advocate certain positions, but nothing you do is wrong, Mr. Levin.

We believe in strong trade laws, I think evidenced by the President's support for super 301 and our invocation of that law by Executive order this spring. We will continue to enforce those laws.

We are prepared to work with the Congress to enhance our trade laws in an appropriate and proper and effective fashion during this implementation legislation period as we go through this so-called nonmarkup process.

We have always taken the position that the enforcement of U.S. trade laws and the enhancement of their effectiveness is a critical part of opening markets and expanding trade, and so we would be pleased not only to work with you but other members of this committee and other Members of the Congress in that connection.

Mr. LEVIN. Well, that is what is going on, I think, and I am not sure that everybody starts from the exact same assumptions of the impact of the Uruguay round on the antidumping laws—which you very much helped to improve in the Uruguay round in terms of the content of the GATT—or section 301.

But, despite somewhat different perspectives, it seems to me that there can be a coming together between all of us who support the GATT and the administration in trying to make sure through the implementation language that the basic integrity of the antidumping statutes and 301, that that basic integrity is sustained if not deepened.

And I just want that on the record, because it might appear inconsistent to say, on the one hand, there is nothing in the Uruguay round that impairs the enforcement of the trade laws, and at the same time we in Congress are working with you to try to enhance those trade laws. And I just want the record to be clear on that.

Personally, I—and I would like the minority leader to hear this, if he might. I heard the interchange between the minority leader and yourself on the issue of sovereignty and the impact potentially on our trade laws, and I happen to basically agree with the minority leader's characterization.

And I think we need to be very direct about this. I don't think there is impingement fundamentally on sovereignty. I do think that there is a potential impact of the Uruguay round through our participation in this kind of a dispute settlement mechanism. And I think that, as a result, we have to understand that by our participation, by the greater authority of the World Trade Organization, that there may be some impact. So the whip's position, the minority whip's position, I made you leader before you are, I think is essentially accurate.

For example, there was a reference to the matter now before the GATT on our environmental laws. I take it if we were to lose that I think it is possible that the Europeans would take action that would have to go through the GATT, and it is possible as a result, Mr. Ambassador, that we would pay a price of some sort because of the loss of our ability to block.

Actually, this decision might come out while we retain the authority to block, right, if we lost it?

Ambassador KANTOR. It is possible, yes, sir.

Mr. LEVIN. So, Mr. Gingrich, I think in that case we continue to have that ability to block, but if the decision came out under the new structure, we would not have the ability to block.

And it seems to me that the accurate description we can give to our constituents is that there is not a loss of sovereignty, but there may be some price to pay for our participation in a strengthened

dispute settlement structure and that we have to look to see whether, on balance, that that participation is likely to come out positively or negatively for this country, that it might come out negatively in one case but overall would work positively to the United States.

And I think that dynamic very much relates to our countervailing duty laws and section 301. And it is for that reason I think it is important that the administration and the Congress work together to make sure that the impact—any negative impact of the Uruguay round is diminished, and that, overall, the laws we have on countervailing duties in section 301 are sustained, if not, and I hope, enhanced.

Now, I went a little further than I thought I might in terms of back and forth here, and I would like your response. But I do think we owe it to ourselves as well as to the public to be very clear on this, as clear as we can.

Ambassador KANTOR. First of all, if I have had any small part in bringing you together with the minority leader, I have done more than my job here today. I am delighted at that, Mr. Levin.

Second, all kidding aside, I really believe——

Mr. LEVIN. I think there is something to be said for that.

Ambassador KANTOR. That is right. The fact is that this agreement not only plays to our strengths and preserves our trade laws and protects our sovereignty, but the dispute settlement mechanism is in our interest. The past is prolog. We have used this more than any other nation by far, meaning the GATT dispute settlement mechanism. And, as I said before, we have won 80 percent of the time.

We are the ones that have been frustrated time and again by especially the European unit but others as well, blocking rulings that would have allowed U.S. products into other markets, especially the European unit in the agricultural sector, although it has affected other sectors as well.

You are right in saying there will be occasions, I assume, over the next number of years that we may lose a case. The fact is, it is a small price for a better mechanism, for open markets, for increased U.S. exports, to build our standard of living and to continue to, of course, fuel this economy which is on the comeback.

Mr. LEVIN. My time is up.

I find that a persuasive argument, and I think it is persuasive because there is also an acknowledgment that when we place ourselves within a broader jurisdiction there can be negative as well as positive impacts.

And I think, as a result, the effort that the administration has under way with us on this committee on a bipartisan basis to make sure that section 301's integrity is sustained as fully as possible and that the countervailing duty statutes are not impinged on but if possible, strengthened—I think your statement and our discussion here underlines the importance of these efforts to make the implementation document a truly meaningful one.

Thank you very much.

Ambassador KANTOR. Thank you.

Mr. MATSUI. Thank you, Mr. Levin.

Mrs. Johnson will inquire.

Mrs. JOHNSON. Thank you, and welcome, Ambassador Kantor.

Ambassador KANTOR. Thank you.

Mrs. JOHNSON. I just want to clarify this because I think this is the fundamental issue not just in terms of the World Trade Organization but in terms of the GATT and America's participation in it. It is, I think, very clear from the statistics that we need the dispute resolution mechanism strengthened because if it is stronger we win.

Ambassador KANTOR. Absolutely.

Mrs. JOHNSON. That is fair to say?

Ambassador KANTOR. Absolutely.

Mrs. JOHNSON. If the rules are tougher, you have to solve disputes and comply with the resolution, we are going to have to abide by those decisions, but our trading partners are going to have to abide by those decisions too, and, on balance, we win in that situation far more often than our trading partners. Isn't that fair to say?

Ambassador KANTOR. Absolutely.

Mrs. JOHNSON. So while this dispute resolution process may require us to do some things we don't like, far more often it will require our trading partners to do some things that they don't like. In an era where all nations are going to have to lower particularly unfair nontariff barriers as well as tariff barriers, there is going to be a lot of political pain associated with developing a more integrated trading system and a more economically interdependent world.

That is why it is really important to us, that the pain be managed in a way that doesn't create political conflicts that can lead to other kinds of conflicts.

I think it is fair to say the dispute resolution mechanism will require us to take some difficult steps—and, of course, we always have the right not to take them. I mean, there is nothing in this agreement compelling us to abide by our own agreement, although the price of not doing so would have a lot of implications for economic growth in America. Nonetheless, we are not being compelled.

But dispute resolution is not the only portion of this agreement that raises difficult issues. We will later on get into some of the national treatment sections, and America has been very aggressive about requiring that our businesses be treated the same as national businesses in Japan and in other countries. We have found through this agreement that there are some ways in which we don't treat foreign competitors in our market the same way we treat American businesses.

So the issue of equity, of fairness, of treating people the same here as they treat our businesses, and of other countries treating our businessmen there the same as we treat their businessmen here, of there being a way of reconciling disputes that is equally tough on everybody, that is really the heart of trying to create governance of trade relationships. It is that governance that will allow us to generate greater trade and prosperity.

We don't want to hide from the fact that not only the dispute resolution section will require us to make some tough decisions but the national treatment section will require us to make some tough decisions. If we want to have equal treatment and equal access in other markets we are going to have to do the same in our markets.

Ambassador KANTOR. That is correct.

However, two things come to mind, and you have obviously correctly articulated the situation. One is 96 percent of all of the consumers in the world live outside the United States. They are not only our markets of today, they are our growing markets of the future. It would be a stunning failure of responsibility on our part and lack of leadership if, one, we didn't recognize it, and two, we didn't take advantage of it. That is point one.

As we do that, we also recognize almost every market in the world is more closed than the U.S. market. That is not true in every case. Singapore comes to mind and so does Hong Kong. But in terms of large markets, they are more closed than U.S. markets in most cases. The fact is that the dictates of this agreement which require everyone to undertake the same obligation are effective in terms of opening these markets to U.S. trade and the U.S. businesses as well as growing our jobs here in this country and raising our standard of living.

That is what is critical here. So we have much more to gain—it is not even close, frankly—than we have to lose. And that is what we have been trying to articulate here and you have brought it out—and I thank you—quite well.

The fact is that the dispute settlement mechanism is only one part of an overall agreement. The ability to use that mechanism will enhance opening markets overseas for U.S. products, and therefore, grow jobs in our country.

Mrs. JOHNSON. Thank you, Ambassador Kantor. That 96 percent really reminds you how much we have at stake in passing the implementing law to enforce the GATT.

Thank you.

Mr. MATSUI. Thank you, Mrs. Johnson.

Mr. Ambassador, I want to thank you very much. You spent 2 hours with us today, and we appreciate it, knowing your schedule. It really is our privilege to have you here. We look forward to working with you on the GATT. We hope to have that through our subcommittee by the end of this month.

Thank you very much.

Ambassador KANTOR. Thank you, Mr. Matsui. I appreciate it. Thank you, Mr. Chairman.

Mr. MATSUI. At this time I would like to call the second panel, Willard Workman, Jeffrey Lang, William Lovett, Pat Choate and Bruce Fein. Would they come up to the witness table and be prepared to testify?

Mrs. KENNELLY [presiding]. Thank you, gentlemen. And we will proceed. I would like to make note that your entire testimony will be placed in the record, so if at all possible you are able to summarize your testimony, it would be appreciated. And know that every word will be on the record.

We will begin with Willard Workman, vice president of the U.S. Chamber of Commerce.

Mr. Workman.

STATEMENT OF WILLARD A. WORKMAN, VICE PRESIDENT, INTERNATIONAL U.S. CHAMBER OF COMMERCE

Mr. WORKMAN. Thank you, Madam Chairman. We are pleased to be here today. We have had a longstanding interest in the Uruguay round negotiations, and we appreciate the work of this committee in holding this hearing on this particular subject, because we think there are a lot of misconceptions out there.

My job here today, I think, is to explain to you from the business community's point of view why we are so interested in having an effective and efficient and speedy dispute settlement mechanism. And in the interest of brevity, I think if you turn to page 5 of my testimony, the little chart there pretty much says it all.

In February 1987, the Chamber took a look at about 56 GATT cases, or 301 cases that had been undertaken by the U.S. Trade Representative's office between 1975 and 1987. And we were looking at how long did it take for these things to be processed, to reach closure? On average, you will note that for cases that went to the GATT, it took 4.6 years.

I must explain that number a little bit. That is a misnomer, because there are about 30 cases that were still pending in the GATT at that time that continued on beyond February 1987; and in fact, there are a couple that are still there today.

In the 301 cases against non-GATT members that did not require us to go to the GATT dispute settlement mechanism, you will note that the average time was 1.3 years. So it took, going through the GATT, just to—and many of these reached no conclusion. But it was taking three-and-a-half to four times longer for a case affecting American industry to be processed through the GATT than through the non-GATT mechanisms. That is one reason why we worked very hard with this committee and with the Congress in the 1988 trade bill.

We think that in 1988 the Congress enacted a lot of very basic reforms to help with the U.S. side, but the bottomline was there was still this problem in the GATT. And by way of what industries were affected, the one case, the longest one going at that time that we looked at, involved white flour, and that was filed against the European Community.

There were others that ranged from soybean oil and meat, pasta, canned fruit, steel, loaders, livestock feed, thrown silk, leathers, cigars, pipe tobacco, nonrubber footwear and so on. So it cut across the broad spectrum of American industry.

In our view, the Chamber feels that the—on balance, the GATT is a good agreement. We support it. We support your efforts to not only clear it out from this committee—hopefully, this month—but to have the Congress vote and pass the agreement in 1994.

We do have some suggestions for improvements. They are appended to my testimony, relate principally to the areas of antidumping, intellectual property protection, specifically section 337, some services. We were somewhat disappointed in the services section, but it is better than what we had before—certainly, a lot of issues about the Subsidies Code.

And then finally we have a few comments that we will offer on the TRIMs, or trade-related investment section. With that, I will

conclude my testimony and feel free to respond to any questions you may have.

Mrs. KENNELLY. Thank you very much, Mr. Workman.

[The prepared statement and attachment follow:]

TESTIMONY
on the
WORLD TRADE ORGANIZATION
to the
HOUSE COMMITTEE ON WAYS AND MEANS
for the
U.S. CHAMBER OF COMMERCE
by
WILLARD A. WORKMAN
June 10, 1994

Introduction

I am Willard A. Workman, Vice President, International of the U.S. Chamber of Commerce. I am pleased to testify on behalf of the Chamber federation, which consists of over 215,000 businesses and organizations, including 3,000 local and state chambers of commerce, 1,200 trade and professional associations, 69 American Chambers of Commerce abroad, and 11 bilateral international business councils.

The GATT Uruguay Round Agreement, which was formally signed by 117 countries on April 15, 1994, in Marrakech, Morocco, is the most sweeping trade agreement in the past 45 years. One of its most important elements is the proposal to create a World Trade Organization (WTO). This proposed new institution deserves careful scrutiny to determine if it advances U.S. interests. Concerns have been expressed both by members of Congress and the general public, and I commend the Committee for providing this opportunity to address the subject today.

Allow me to state at the outset that the Chamber strongly supports the GATT Uruguay Round Agreement and has concluded that the WTO does not infringe upon U.S. sovereignty. Furthermore, we have concluded that the WTO offers the United States additional leverage with which to achieve greater fairness and timeliness in world trade dispute resolution and thereby would make a major contribution to our economic interests. I will elaborate on why we have come to this conclusion in a moment.

Recommendations for Implementing Legislation

First, however, let me put the WTO proposal into the context of the overall GATT Uruguay Round Agreement. The Chamber believes the benefits of the Agreement are enormous and vigorously supports rapid Congressional passage. Even if we adopt a conservative interpretation of the analysis cited by the U.S. Administration, what the Uruguay Round agreement will mean to America is an increase in the U.S. annual Gross Domestic Product of $100 billion by the year 2002. A separate study by OECD economists -- which they themselves acknowledge only captures a part of the total economic gains the United States could expect to reap -- foresees a $28 billion annual GDP rise after implementation of the Agreement.

The Uruguay Round Agreement will bring benefits for a number of reasons. It provides greater market access for a wide range of goods and reduces significantly agricultural subsidies. For the first time ever, it brings services within the discipline of the GATT and establishes an international regime for the protection of intellectual property. In addition, the current GATT dispute settlement mechanism would be significantly strengthened. While the Uruguay Round agreement is by no means perfect, the Chamber's Board of Directors has concluded that overall it will benefit American business in general and Chamber members in particular.

The task facing this Congress now is to decide how to amend U.S. laws, where necessary and appropriate, to bring them into conformity with the Uruguay Round Agreement. At the same time, the United States faces the challenging task of crafting implementing legislation that simultaneously preserves U.S. prerogatives under its own trade laws and minimizes the likelihood of successful challenges in GATT dispute-settlement fora.

Permit me to summarize key issues that the Chamber would like to see addressed in the implementing legislation:

Antidumping

The proposed antidumping rules would impact the operation of U.S. antidumping law in a number of ways. The Chamber has repeatedly expressed to the Bush and Clinton Administrations its concerns about provisions dealing with who has standing to seek relief; whether antidumping orders should be "sunsetted"; the establishment of "de minimis" dumping margins and import volumes; and other matters. The annex to my testimony identifies some areas where Congress can act to strengthen the U.S. position within the context of the agreement.

Dispute-Settlement Understanding

The Chamber has long sought a strengthened dispute-settlement process that is compatible with current U.S. trade law, including section 301. The provisions of the Uruguay Round Agreement establish a more effective and expeditious dispute-settlement process that we believe does not require material changes to the existing U.S. inventory of market-access statutes, such as section 301 and "special 301."

Intellectual Property

The Chamber has expressed a number of reservations about earlier draft Uruguay Round language on this subject. Those reservations refer to such matters as long transition periods for coverage under the new rule; lack of so-called "pipeline protection" for new products that might be pirated while they are waiting on lengthy patent-approval processes; excessively liberal allowances for compulsory licensing by foreign governments; exhaustion of intellectual property rights; inadequate copyright provisions; lack of clarity concerning whether certain biotechnology is patentable; and whether section 337 of the U.S. Trade and Tariff Act might need amendment. The annex to my testimony identifies some areas where Congress can act to strengthen the U.S. position within the context of the agreement.

General Agreement on Trade in Services (GATS)

The link between GATS and the market-access talks is critical. Significant progress on market access is a critical prerequisite for the success of this agreement. While there have been commitments to liberalize made by more than 50, actual liberalization seems to be minimal, especially in Japan and the newly industrializing countries (NICs). So GATS appears to be largely a framework at this time.

Subsidies

Much of the proposed language in earlier draft agreements has been criticized as needing clarification. In seeking clarification, the Chamber has also expressed concerns that certain subsidies, such as regional development and research and development (R&D) subsidies, might be too readily defined as "green-zone" or allowable.

The Chamber has also expressed opposition to the use of approaches to subsidies that might "parallel" those antidumping proposals which we have opposed. The final agreement does, in fact, categorize subsidies according to a "red-yellow-green" category and places regional development and R&D subsidies in the green category.

The Chamber understands and fully appreciates the concerns raised by Senator Danforth and others in their January 31 letter to Ambassador Kantor. The Chamber is concerned about the possible proliferation of so-called "green-light" subsidies that generate market inefficiencies and require countervailing public expenditures that exceed the United States' ability to pay for them.

These and other unresolved issues must be subject to tough international discipline eventually. It is unfortunate that such discipline could not be achieved in the Uruguay Round. Therefore, the United States should seek to commence negotiations as soon as possible, while

also reserving the right to take whatever actions are necessary and appropriate under countervailing duty and other U.S. laws to alleviate the negative impact of such subsidies on U.S. interests.

Trade-related Investment Measures (TRIMs)

Measures such as local content and export performance requirements have long been a thorn in the side of many U.S. companies trying to do business in foreign markets. And yet, until now there was no coverage in the existing GATT rules. The Uruguay Round Agreement appears to fix this. Under the Uruguay Round Agreement, TRIMs would be phased out over a two to seven year period, depending on a country's level of economic development. After five years, the WTO would seek to determine whether additional investment and competition policy measures are needed.

The Chamber's position has been that TRIMs needed coverage under GATT but that the Dunkel language left certain key TRIMs -- such as technology transfer requirements -- out. This same concern extends to the final agreement. There has also been concern over whether developing countries might take excessive advantage of waivers applicable to them.

As with other potentially disputable topics, the United States must remain prepared to utilize both the WTO dispute-settlement process and its own trade laws to address these problems. Where ambiguity exists, domestic U.S. interests should prevail until such time as the GATT dispute-settlement process finds against the United States. Textual ambiguity is not a justification for advance unilateral concessions by the U.S. government.

The Proposed World Trade Organization: Myths and Realties

Returning now to the question of the impact of the proposed WTO on U.S. interests: I would like to single out what I believe are the four principal myths that have been raised:

Myth #1: U.S. domestic law, including environmental, labor and consumer standards, would be threatened by WTO dispute-settlement panel decisions.

Myth #2: The WTO would prevent the United States from using its laws to address foreign unfair trade practices.

Myth #3: The WTO would be an "economic United Nations" whose majorities can impose decisions contrary to U.S. interests.

Myth #4: The WTO would be a much more powerful organization than the current GATT institution and hence threatening to U.S interests.

These criticisms are unfounded in fact and fail to recognize that the changes introduced by the Uruguay Round Agreement provide substantially greater opportunities for U.S. individuals and businesses to exercise their rights to operate in a more open global marketplace and to sell or buy from citizens of other countries with less government interference. Let's take these arguments one at a time:

- **Myth #1: U.S. domestic law, including environmental, labor and consumer standards, will be threatened by WTO dispute-settlement panel decisions.** By joining WTO, the U.S. can be compelled to change its domestic laws by a decision of the WTO or dispute-settlement panels set up under WTO rules. Critics charge that American environmental, labor and consumer standards are at risk.

Response: No ruling by a dispute-settlement panel can become a part of U.S. law without Congressional action and Presidential signature. Joining the WTO would not require the United States to undertake a sweeping process of bringing its laws into conformity with WTO. The WTO rules are designed to speed up the dispute-settlement process and prevent the violator of agreed rules from blocking a decision. U.S. government officials and U.S.

business have been highly critical of existing dispute-settlement rules. In the past, panels have taken from two to eight years to reach a decision which could then be indefinitely blocked by the violator. Therefore, a faster and more binding dispute-settlement process is a bipartisan goal which both the U.S. Congress and three Presidents have supported. The 1988 Trade Act establishes as Uruguay Round objectives "more effective and expeditious dispute-settlement mechanisms" and "mechanisms within the GATT to enable better enforcement of U.S. rights." These reflect a calculation that U.S. economic interests are served by stricter enforcement of international rules, even if on occasion decisions unfavorable to the United States must be adopted. If the United States is a defendant and loses a panel decision, it still retains the power to disregard the panel's decision and take unilateral action that is in the national interest.

- **Myth #2: The WTO would prevent the U.S. from using its laws to address foreign unfair trade practices.** Membership in WTO would prevent the United States from using Section 301 and other trade laws for this purpose.

Response: The United States will be able to continue using Section 301 or Super 301, both to enforce our rights under the WTO and to address unfair trade actions not covered by our rights under the Uruguay Round Agreement. If the United States decided to undertake trade retaliation measures, these could be successfully challenged only if the WTO rights of the foreign government were infringed. Moreover, the United States can continue to assert its legitimate market-opening interests with the 145 countries that are not GATT members, led by China and Taiwan.

- **Myth #3: The WTO would be an "economic United Nations" whose majorities can impose decisions contrary to U.S. interests.** By accepting the one-country, one-vote rule in WTO, it is alleged that U.S. law will be subject to challenges by the large majority of small, developing country members of the organization, who may be hostile to U.S. interests.

Response: Substantive WTO decisions, such as interpretations of WTO rules, require a 2/3 majority vote with no binding effect on countries who oppose the decision. Moreover, safeguards in WTO ensure that U.S. interests cannot be overridden by **procedural** ploys. In order to become binding, a proposed decision must first receive a 3/4 majority vote that affirms that an issue is "procedural." That procedural issue would subsequently be subject to a vote requiring a 2/3 majority in order for it to become binding on all members. On important questions, the WTO is expected to continue the GATT tradition of decision by "consensus," under which agreement by major trading nations such as the United States is essential on major issues.

- **Myth #4: The WTO will be a much more powerful organization than the current GATT institution and hence threatening to legitimate U.S interests.** As such, the WTO will impose major new limitations on the ability of the United States to act.

Response: In fact, the WTO does extend the reach of international rules to major new areas of world trade, including services, intellectual property protection, and agricultural subsidies. More countries would be subject to rules of fairness under the so-called GATT Codes, such as subsidies, procurement, and standards. U.S. business has for some time argued that a more powerful multilateral mechanism is needed to ensure fair and timely resolution of trade disputes. **This would represent a major gain for the United States in getting other countries to play by the rules.**

However, where WTO rules have been modified compared to the GATT, the impact for the U.S. is almost entirely positive. The WTO's rules are structured in such a way as to minimize the likelihood that WTO might disadvantage the United States. Safeguards against 2/3 majority decision-making are stronger. With regard to dispute-settlement, past experience suggests the United States will likely be the net beneficiary because it will help us to challenge successfully numerous "disguised" barriers to trade which exist among our trading partners.

Some argue WTO would subject the United States to control by a powerful, secretive, and independent international bureaucracy on which there are no democratic controls. In fact,

the secretariat which administers GATT and which would provide administrative support for the new WTO is a small and politically neutral staff, which is closely watched and controlled by the member state representatives. Its ability to exert independent authority is minimal. The WTO, which would be a formal organization rather than an "agreement with a secretariat," will offer more opportunities for participation by non-governmental organizations and for greater openness in decision-making.

Timely Dispute Settlement and the World Trade Organization

The Chamber has long been concerned with the inefficient workings of both U.S. and multilateral dispute settlement processes. Far too often, companies with legitimate grievances against foreign trade practices have had to wait years before their cases get resolved -- by which time those companies could very well end up out of business.

In February 1987, the Chamber surveyed section 301 case files that USTR made available at the time. A principal purpose was to ascertain the amount of time section 301 cases took to resolve. Our survey did not focus on whether the resolution was favorable to petitioners or respondents. However, as the table below indicates, we found that section 301 cases that went to the GATT often took many years -- 4.6 years on average -- to be resolved.

TYPE OF SECTION 301 CASE	AVERAGE DURATION
Export subsidy cases (7 between 1975 and February 1987)	6.0 years
Other subsidy cases (4 between 1975 and February 1987)	4.2 years
General GATT cases (14 between 1975 and February 1987)	4.0 years
AVERAGE FOR ALL "GATT" SECTION 301 CASES	**4.6 years**
Non-GATT cases (31 between 1975 and February 1987)	1.3 years
Overall average for all section 301 cases	2.8 years

The conclusion that we drew was that, while the U.S. government appeared to be generally in conformance with deadlines established by our own laws, continuation of the case in GATT fora resulted in substantial delays. This is a principal reason why the Chamber supported the strengthening of section 301 and other market access laws as part of the 1988 Trade Act -- in particular those provisions that required U.S. action against GATT or other trade agreement violations within eighteen months after an investigation was initiated or thirty days after conclusion of a dispute settlement procedure, whichever was earlier.

The 1988 law permits USTR to waive retaliation against trade agreement violations, but only if certain conditions are met, including a timely ruling by a GATT panel that is unfavorable to the United States

And that is the point -- timeliness. The Chamber believes that the WTO will provide for much improved timeliness in the dispute settlement process. Such timeliness should result in important net market-opening benefits for U.S. firms in the global market, given that our market is so much more open that those of our major trading partners.

In summary, the objections to WTO I have discussed are not supported by a dispassionate examination of the facts. However, I would like to conclude our assessment by observing that the WTO, with all its positive features, could, nevertheless, be employed for the pursuit of undesirable objectives. The future policies of our own government will be a key factor in determining whether or not this happens. Specifically, there is a danger -- widely-perceived among the business community -- that some within the U.S. Administration and Congress intend to use a future WTO to advance a broad social agenda unrelated to promoting

fair and open global trade. These individuals see the WTO as a vehicle for linking action on labor standards and environmental protection to trade. It should be noted, however, that the risk that WTO might be abused in this way stems from the possibility the United States will pursue misguided policies, not from any inherent deficiencies in the WTO itself.

Conclusion

Let me conclude by reiterating that the Chamber strongly supports rapid Congressional passage of an Uruguay Round implementing package. We recognize that the Uruguay Round Agreement is by no means perfect and I briefly addressed ways in which we believe implementing legislation could be enhanced. But we believe fears that the proposed WTO would be damaging to U.S. interests are unfounded.

It should also be emphasized that to reap the full benefits of world trade, U.S. participation in a new WTO must be part of sound overall trade and economic policies The United States should continue efforts wherever possible to negotiate mutually beneficial agreements with others -- in the Western hemisphere and elsewhere -- that deepen our trade cooperation beyond what was achieved in the Uruguay Round. In addition, the United States must continue to strengthen its competitiveness at home. This means continuous improvement in the quality of U.S. production processes, technologies, and the workforce. Support for a new global trade organization should simply be viewed as a useful part of this larger U.S. strategy to realize the economic potential of the global marketplace.

That concludes my statement and I will be happy to answer any questions you have.

ATTACHMENT

ANNEX TO THE STATEMENT ON THE WORLD TRADE ORGANIZATION

The U.S. Chamber of Commerce reviewed the antidumping and trade-related intellectual property provisions of the 1994 GATT Uruguay Round Agreement. The antidumping provisions were measured against the Chamber's 1990 recommendations on the reform of U.S. antidumping laws. The Chamber recommends legislative changes with respect to the following issues that were addressed in the GATT Uruguay Round:

ANTIDUMPING

1. "Standing." Antidumping petitioning procedures should ensure appropriate access for domestic industry to relief from foreign dumping.
2. "Weight averaging/domestic goods and export goods." Improved methods of calculation are needed for determining whether prices of foreign goods in their home markets differ significantly from prices of those goods in the U.S. market.
3. "Constructed value/general sales and administrative expenses." U.S. producers' general sales and administrative expenses should be considered in calculating dumping margins, when appropriate foreign exporters' data are not available.
4. "Constructed value/profits." Below-cost sales must be disregarded in calculating foreign exporters' profits and alternative methods should be considered.
5. "Selection of currency exchange rates: use of "lagged" exchange rates." Limitations should be imposed on the use of exchange rates which distort price comparisons in dumping calculations.
6. "Deduction of related importer profits from export (U.S.) prices." Reasonable deductions of such profits from the total import price should be required, in order for U.S. practice to correspond more closely to that of our trading partners.
7. "De minimis' dumping margins." U.S. law should comply with the 1994 GATT agreement by defining 'de minimis', i.e., not subject to investigation, as 2% or less of the foreigner's export price.
8. "Cumulation (negligible imports)." In antidumping cases involving a "regional" industry, the analysis of whether imports are negligible should be performed on a regional basis, to ensure consideration of a possible adverse impact on the domestic industry.
9. "U.S. proposal regarding repeat offenders." Congress should enact legislation to accelerate investigations and increase sanctions for repeat violators and evaders of U.S. antidumping orders.
10. "Deterrence of injurious dumping through the application of penalties." Congress should enact legislation to accelerate investigations and increase sanctions for repeat violators and evaders of U.S. antidumping orders.
11. "Automatic termination of AD findings ('sunset')." To ensure adequate time for preparation of review, U.S. law should define all orders entered prior to July 1, 1995 as entered on that date.

ATTACHMENT

TRADE-RELATED INTELLECTUAL PROPERTY (TRIPs)

General: Implementing legislation should:

1. Instruct U.S. government representatives to press the TRIPs Council to immediately begin fulfilling its obligation to monitor the operation of the TRIPs Agreement and members' compliance with their obligations under the agreement.

2. Retain to the maximum degree possible the flexibility for bilateral action currently available under Special 301. This is important because certain types of intellectual property rights violations that do not expressly violate the GATT will not have the benefit of the Uruguay Round's dispute-settlement mechanism for five years.

3. Contain measures to ensure careful monitoring of countries' application of the provisions in the TRIPs agreement on compulsory licensing and border measures, and to require U.S. action if there is evidence that these measures are being abused.

Transitional Arrangements: Uruguay Round provisions providing lengthy transitional arrangements for developing countries and countries undergoing change from centrally planned to market economies could slow or even halt progress toward improved intellectual property protection and enforcement if the transition period is abused by those countries. To prevent such an outcome, the following issues should be addressed in implementing legislation:

1. The transition period should be interpreted, not as a standstill period for, but rather a time period in which to undertake all measures necessary to fully meet TRIPs obligations at the latest by the end of the four year and nine year (for technologies not previously protected) transition periods. Extensions should be viewed as unacceptable.

2. The United States should take a leadership role in providing technical assistance in the preparation of domestic legislation on the protection and enforcement of intellectual property rights (IPRs), prevention of the abuse of IPRs, and establishing the domestic personnel and offices relevant to those purposes, as provided for under Article 67 in TRIPs.

Section 337 [remedy against the importation of goods produced through violation(s) of U.S. intellectual property rights]

1. Section 337 should be modified only as necessary to meet the specific criticisms in the GATT Panel Report adopted by the GATT Council on November 7, 1989.

2. Provisions in the Uruguay Round legislative package dealing with modifications to Section 337 should substantially accord with S. 148, introduced by Senator Jay Rockefeller.

Mrs. KENNELLY. Our next witness will be Jeffrey M. Lang—excuse me. Thank you, Mr. Workman.

Our next witness will be Jeffrey M. Lang, partner, Winthrop, Stimson, Putnam & Roberts, Washington, D.C.

Mr. Lang.

STATEMENT OF JEFFREY M. LANG, PARTNER, WINTHROP, STIMSON, PUTNAM & ROBERTS, WASHINGTON, D.C.

Mr. LANG. Thank you, Madam Chairman. I am here by invitation of the committee, not representing any client; and although I worked on the staff of the Congress for 11 years, this is the first time I have been back to the Congress since I left 4 years ago. It is a pleasure to be here.

And I want to take advantage of your invitation to put the statement in the record and just skip to a couple of things I think might be interesting to the committee, because everything was explored so thoroughly with Ambassador Kantor.

Mrs. KENNELLY. Thank you, Mr. Lang. Thank you for coming back after 4 years.

Mr. LANG. You bet. A pleasure.

The first assignment I got when I first came to the Congress was to figure out whether the Tokyo round trade agreements that had been negotiated, now 16 years ago, were what lawyers call "self-executing." A self-executing agreement would be one that becomes the law of the land in the United States, directly, not through any intercession of Congress.

And the authorities were pretty clear that these trade agreements were not self-executing; but just to be absolutely sure about the matter, my advice was, well, make it clear that they are not. And as a result of that, the Ways and Means Committee and the Senate Finance Committee instructed me to draft a provision which became section 3 of the Trade Agreements Act of 1979, and has been reenacted in each trade agreement approval since then.

And essentially what that provision says is, if an international body, including the GATT, orders us to do something, it can't be done without going to Congress; and no court of the United States can treat that action as binding on any U.S. citizen, and it can't be the basis for any legal action in the United States.

So as far as I am concerned, you have considered this sovereignty issue some years ago and put it to rest. And I would assume that you would put section 3 in the bill to implement this trade agreement, and that would be the end of that question, as a legal matter.

Now, the next question is whether this change that you have been discussing this morning is good for the United States or bad for the United States, as compared to the current system—not as compared to an imaginary system, but the current system.

There are four very important changes in the dispute settlement area in this agreement; and we have only discussed one, and possibly two of them. First, we talked about reversing this rule of consensus, and that is clearly important. The second Ambassador Kantor talked a little bit about, but I don't think people focused on it, which is really terribly important, and that is that this is an integrated dispute settlement system, one system for all agreements.

And I will come back to that in 1 minute, because I think it is so important.

The third is that there is a new institution added called an appellate body; and the fourth is that there is an arbitration procedure, which is new, for determining the level of compensation that countries owe one another when they refuse to change their practices in accordance with these panel reports.

Now, let me just focus in on one of these that hasn't been discussed, which is the integrated system, because I think it is so important.

What we had at the end of the Tokyo round was the GATT and a series of 13 trade agreements very closely related to our ability to export. These were agreements that said, for example, that a country couldn't use a standard as a disguised barrier to trade, such as the standard for how wide apart the plugs on an electric plug must be, something like that. This was terribly important to the United States, because we were getting hit with all kinds of technical barriers to trade, such as, for instance, that American-made skis don't work on Japanese snow, all those kinds of things.

Now, the trouble with those agreements was that each of them had its own separate little dispute settlement system, and the only retaliation allowed was under the obligations of that agreement. So if you had an export problem such as the ski example, all you could do was distort American standards for skis or for electric plugs or whatever, which was no remedy at all. We never used it, because we never could use it.

Now, under the new World Trade Organization, all of those agreements are rolled into one package and we are allowed to cross-retaliate. And the WTO text says very explicitly, if you have a standards problem and a panel orders that country to change the standard, and it refuses to do so after a reasonable period of time, you can retaliate somewhere else.

You can—just to use an example, you could raise the duties on imported Japanese skis. I don't know what the remedy would be, but the point is that you don't have to raise a standard; you can raise a duty; you can take some other action. Now, that ability to cross-retaliate tremendously increases our leverage as a complainant in these cases.

In addition, the 1979 agreements were not signed by all GATT contracting parties. The GATT was signed by everybody. But these 13 agreements were signed by less than a majority, sometimes less than 20 countries, meaning that many countries had no standards code obligation to the United States. We had no way to retaliate against them under the GATT.

Now, under the new agreement, all members of the GATT undertake all those obligations. There may be transition periods for developing countries and all kinds of others, but over a period of time we will acquire all rights against all members of the WTO. And, again, it enormously increases our leverage.

So I just want to point out that the reverse consensus rule is not the only major change that is going on here. There are four or five of them, and they are really important to us.

Now, the last thing I want to say—or second-to-last thing maybe—concerns the reversed rule of consensus and the use of our

economic power. And I am speaking now as a practicing lawyer who has to deal with these practicalities every day. If you have a system of blocking now, where a panel makes a recommendation and any country of any size can prevent that report from being adopted, and that makes it unlawful to act on the basis of that report, you have a system in which we have to use our economic power. Why? Because every time we start a case, we are going to be frustrated. Somebody is going to say to us, well, sure you went before the panel, but we voted to veto, we are against this thing.

Now, if you are the United States, you don't have too much of a problem with that, because you can use your economic power to overcome that decision. And there are many examples of that in the past, where we won a case, somebody vetoed us, and we then went ahead and retaliated anyway, knowing that retaliation was unauthorized and in violation of our obligations, but we had the economic muscle to do it.

Now, my point is this: This is not a question of our having less economic muscle today—maybe relatively we do—but the issue is the efficient use of that economic power. If we go to other governments with the imprimatur of one of these panel decisions, we have enormously more ability to persuade them to act in accordance with that panel report than we do if we act through sheer economic power. I mean, it is just simple, straightforward politics.

If we go to a country and say, you have to do this because we say you have to do it, even though in saying you have to do it we are in violation of our GATT right, obviously they have a basis for resisting doing it; whereas if we go to that country and say, look, we won before a panel—in effect, 117 countries are saying that we won this thing—the politics of getting that country to change that practice becomes enormously easier. We conserve this valuable resource of economic power for the cases in which we really need to use it. We can handle more cases and we can handle them more effectively as a complainant.

Now, we are occasionally a defendant. And there are several things to say about that. First, for many years now, we have been responding to these panel reports. We did block some, but eventually we gave up blocking. I think maybe both the Chairman and you, Mrs. Kennelly, were here when something called the "book manufacturing clause" was repealed. We amended the DISC. Now, that was the United States coming into compliance with these GATT orders at some cost to a domestic industry, over some reasonable period of time, but we did it.

And when we are dealing in these cases with another powerful country, say the European Union, there are going to be a great number of situations in which one of us can retaliate against the other, using sheer economic power. We might choose, for instance, not to accept a decision against us regarding CAFE and we might say to them, OK, we are going to retaliate against you in whatever. We are big, strong countries. And I would suggest that the politics of that situation is, we need these dispute settlement panels—provided they are subjective, staffed adequately, and do a quality job, we need those panels to help us resolve those problems.

We are still going to conduct a negotiation about how to resolve inconsistencies, but let's say we lose one of these cases to a weak

country—Europe, for example, just lost a case about bananas to a group of Latin American countries that don't import very much from Europe. Now, Europe is going to make a minor change in its banana policy, which it negotiated with those countries. Why a minor change? Because they don't import much from Europe, there is not much they can take away by way of retaliation.

In other words, our economic power is going to continue to condition how we respond to this dispute settlement system, but it is going to make it easier to conserve that power and to use it intelligently.

Now, let me just close by saying I have spent some time thinking about these amendment and waiver provisions that have been discussed a little bit this morning. I am not sure that any of them will be used, at least in the early years. In the early years, the major countries are going to, it seems to me, find it in their interests to continue the consensus system.

But the United States is the oldest democracy in the world. It is the intellectual leader, if you will, the good guy in this system. It has 200 years of experience in lobbying all kinds of organizations. And I think the skillful diplomacy that has been applied to this round of multilateral trade negotiations and to our trade policy over the last 45 years can be applied to that system and used in our national interest.

I don't think these rules are going to put us at a disadvantage. And I can tell you one thing, getting 87 of those countries to vote the same way today, is a lot different than it was when I started out in the trade business 20 or 25 years ago, because it used to be that they all wanted to gang up on the United States.

The reality today, and the increasing reality in the future is going to be, that countries are forming blocs and coalitions over there to achieve hardnosed economic objectives. And they are going to find it is in their interests to cooperate with us, just as a very junior Congressman occasionally finds it in his or her interest to cooperate with one of you.

Well, thanks very much for your time.

Mr. MATSUI [presiding]. Thank you, Mr. Lang.

[The prepared statement follows:]

Full Committee Hearing on the World Trade Organization

Prepared Testimony of Jeffrey M. Lang, Partner

Winthrop, Stimson, Putnam & Roberts[1/]

Mr. Chairman:

I am Jeffrey M. Lang, appearing here today on my own behalf, by invitation, to discuss with the Committee the World Trade Organization (WTO) Agreement negotiated over the last seven years, and, in particular, the dispute resolution provisions of that agreement.

My assignment today is not to evaluate what the WTO Agreement might have been. The assignment is, rather, to compare the WTO Agreement with the current international regime -- which would presumably survive if the Congress refused to approve and implement the WTO Agreement -- to see which of the two is in the best interest of the United States.

The dispute resolution provisions of the WTO Agreement are contained in Annex 2, which is entitled, "Understanding on Rules and Procedures Governing the Settlement of Disputes." I shall call this Annex the DSU (for Dispute Settlement Understanding), which seems to be its common name among the negotiators and draftsmen.

There are four major changes in GATT dispute settlement procedures under the WTO.

First, the DSU is an integrated, comprehensive system, whereas the current GATT system is really a number of separate identifiable procedures that are largely uncoordinated and occasionally conflicting. Second, the DSU reverses the rule of consensus, meaning that panel reports (or Appellate Body rulings, as the case may be) automatically become authority for retaliation. Third, the DSU creates an important new element in the dispute settlement process, the Appellate Body. And, fourth, the DSU creates for the first time a formal procedure for arbitration over the amount of compensation or retaliation that is appropriate in particular circumstances.

Integrated Dispute Settlement.--The integration and comprehensiveness of the DSU is a positive development because it eliminates uncertainty over how disputes will be resolved. It ensures that all issues can be brought together in one proceeding. Moreover, it expands the remedies available. Let me explain.

By the end of the Tokyo Round in 1978, the negotiating achievement consisted of 13 new agreements, each of which had different signatories. Of course, the major countries in the GATT system -- the United States, the European Community, Canada, Japan -- and a number of other countries were signatories to all these agreements, but most members of GATT were not signatories to any of these agreements. This meant that each of these agreements, which are still in effect, has its own unique dispute resolution procedure.

A good example is the Agreement on Technical Barriers to Trade -- the so-called Standards Code. The purpose of this agreement was to remove the most prevalent and pernicious

---

1. From 1974 to 1979, staff attorney and then Deputy General Counsel, U.S. International Trade Commission; from 1979 to 1990, professional staff attorney and then Chief International Trade Counsel, U.S. Senate Committee on Finance.

nontariff barrier identified by studies of the subject stretching back to the 1960's, namely, a protectionist "standard." For instance, one such standard was a Japanese law that barred the import of American snow skis on the basis that the skis would not work on Japanese snow.

In the United States, we tend to think of dispute settlement as a quasi-judicial procedure, which leads us to examine agreements for ultimate remedies. I'm not at all sure that is the most useful way to evaluate these agreements, but if it is, then the ultimate remedy is never the same as in domestic law enforcement proceedings. There is no GATT police force, nor is there any GATT jail. Rather, the ultimate trade agreement remedy is always "retaliation," that is, withdrawing a concession previously given which offsets the opportunities for exports lost by reason of the violation of the other signatory government.

Therefore, if the United States has a complaint under the Standards Code about such a barrier, then it can invoke Article 14 of the agreement, entitled "Consultation and Dispute Settlement." This provision established more or less the same procedures as we have become accustomed to over the last fifty years: A panel considers the dispute and makes a recommendation, which, if adopted and if adverse to the defending signatory, may serve as the basis for retaliation. So what is the nature of retaliation under the Standards Code? The provision is Article 14:21, which provides as follows:

> "If the Committee considers that the circumstances are serious enough to justify such action, it may authorize one or more Parties to suspend, in respect of any other Party, the application of such obligations under this Agreement as it determines to be appropriate in the circumstances."

The critical provision here is the phrase, "under this Agreement." There are no tariff obligations in the Standards Code. There are simply obligations to have fair and open standards-making procedures and not to have standards that are disguised barriers to trade. So retaliation consists of what? Promulgating a patently protectionist standard? It is in truth almost impossible to enforce the Standards Code.

Now, under the WTO, the situation is quite different. The Standards Code is brought forward as Part 6 of Annex 1A of the WTO Agreement, one of the agreements "On Trade in Goods." The WTO Agreement provides that the Standards Code, as well as most of the other agreements entered into since 1947 including the GATT itself, "are integral parts of this Agreement, binding on all Members." (Please see General Interpretive Note to Annex 1A, which lists the agreements in annexes that cross-reference this provision of the WTO Agreement, Article II:2). It should therefore not be surprising that the DSU declares, "The rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement rules and procedures of" all the WTO agreements -- including the Standards agreement. And this, in turn, leads to the following provision, Article 22:2 of the DSU:

> "If no satisfactory compensation has been agreed . . ., any party having invoked the dispute settlement procedures may request authorization from the DSB [the Dispute Settlement Body, essentially, a committee of the whole of the WTO membership] to suspend the application to the Member concerned of concessions or other obligation under the covered agreements."

The critical phrase here is, "the covered agreements," which is defined in Article 22:3(g) as, effectively, all the agreements with respect to goods, including both the tariff agreements and the standards agreement.

In other words, retaliation for standards agreement violations is not possible today, but it will be possible under the WTO agreement. That is the core of the benefit of integrated dispute settlement. There are some collateral advantages, not so much for our country but for the good administration of this agreement (for example, it assures that if two agreements cover one subject, both agreements will be considered by the DSU system, and thus we will have a more consistent legal development under the WTO).

Reversed Rule of Consensus.--Under Article XXIII of the current GATT, the signatories of the agreement, acting as a body, may authorize a complaining signatory to "suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances." Despite the majority voting provisions of Article XXV, such decisions are traditionally taken by consensus, that is, it requires unanimity to authorize retaliation. In general, the same rules apply under the various free-standing Tokyo Round trade agreements.

Since the tradition of consensus requires unanimity, obviously any GATT signatory, even the "losing" one, can deny consensus and thus prevent the signatories from authorizing the winning party to retaliate. This is known as "blocking" a panel report. If a winning party retaliates without authorization, then the winning party has acted in a manner that is inconsistent with its GATT obligations, and may not be able to defend its retaliation before GATT, even though the action was taken in reliance on a panel report.

As a government that is more frequently a complainant than a respondent in such proceedings, the United States has been frustrated by the consensus rule for many years. The Trade Act of 1988 provides in relevant part as follows:

> "The principal negotiating objectives of the United States with respect to dispute settlement are--
>
> "(A) to provide for more effective and expeditious dispute settlement mechanisms and procedures; and
>
> "(B) to ensure that such mechanisms within the GATT and GATT agreements provide for more effective and expeditious resolution of disputes and enable better enforcement of United States rights." (19 U.S.C. 2901(b)(1).

Today in the GATT, the so-called Montreal rules are implemented through the review of reports by ad hoc panels of experts. The panels review written and oral argument by the governments concerned in a dispute and then make what amount to findings of fact and at least tentative conclusions regarding the application of the relevant trade agreement to the particular facts, together with recommendations on the actions the parties to the dispute should take. Customarily, if the defending signatory loses, then it is admonished to change its practice to come into conformity with its obligations under the applicable trade agreement, as interpreted by the panel. This report is then open for approval by the signatories of the GATT or of the Tokyo Round agreement concerned if the proceeding arises under one of those agreements.

In 1989, the GATT signatories agreed that for the duration of the Uruguay Round, they would employ an enhanced set of rules for dispute settlement, which I call the Montreal Rules for the city where this agreement was reached. (The Montreal Rules are formally cited as the Decision of 12 April 1989, GATT document L/6489). Under the Montreal Rules, the rule of consensus is explicitly retained (Para. G:3), but it is made more difficult to "block" a panel report's adoption for other than substantive reasons. For example, under the Montreal rules, GATT signatories that object to a panel report have to put those objections in writing (Para. G:2), which is intended to discourage "blocking" panel reports on other than substantive grounds.

The WTO takes a step further toward making the global trade agreement disputes settlement process more "effective," to use the terms of the Trade Act of 1988: It reverses the consensus rule.

DSU Article 16:4 provides as follows:

> "Within sixty days of the issuance of a panel report to the Members, the report shall be adopted at a DSB [the new Dispute Settlement Body, a committee of the whole WTO membership acting under the DSU] meeting, unless one of the parties to the dispute formally notifies the DSB of its decision to appeal, or the DSB decides by consensus not to adopt the report."

I will return to the question of appeal in a moment, because the establishment of the Appellate Body deserves separate attention. It is sufficient to my purposes here to note that following a ruling by the Appellate Body, the same reverse rule of consensus applies under Article 17:14 of the DSU.

There are actually two elements to the reversed rule of consensus: First, there is the obvious element of an increased impact of panel reports. They are now adopted unless unanimously disapproved. Since the winning party would evidently have to vote to reverse a panel decision in its favor, it is fair to assume that panel reports will now be more or less automatically adopted.

Second, the automatic adoption is delayed for two months. This time period may allow important time for reflection in particular cases, and, in particular, for negotiations leading to a settlement that could not be achieved otherwise before the panel report was rendered.

In terms of the tactics of trade agreement dispute settlement cases, the reversed rule of consensus is an important change. It increases the standing of panel reports; and it changes the dynamic of the collateral negotiations that always accompany GATT dispute settlement proceedings. Until now, a GATT signatory with an obviously GATT-inconsistent practice was able to negotiate successfully even if a panel report was likely to be, or even if it were actually, adverse to that government. For example, in the recent GATT panel proceeding concerning the European Community (EC) banana import policy, the EC practice of discriminating in favor of certain developing countries in banana imports was expected to be condemned by a panel and ultimately was, but the Community was ultimately able to negotiate a settlement over a period of about six months with the complaining governments in Latin America in some part at least because the EC could "block" Council adoption of this panel report. Under the WTO, the panel report would have been adopted, unless appealed, in two months, putting somewhat more pressure on the Community to move the settlement process forward more quickly, and perhaps to some degree affecting the nature of the settlement (although, as

I will show in a moment, the relative market power of the disputants in trade proceedings is a more important factor in the actual terms of such settlements).

The New Appellate Body.--The WTO creates a completely new institution in international trade, the Appellate Body. Virtually all panel reports are appealable to the Appellate Body.

Unlike panels, whose members will continue to be appointed ad hoc (albeit from an approved list), the Appellate Body's members are limited to seven persons (presumably, individuals), who are to serve in panels of three. These seven people, chosen by the WTO membership (sitting as the DSB), apparently by majority vote but in practice probably by consensus, serve staggered four year terms. While Appellate Body members are obviously expected to have other careers contemporaneous to their service, they may not act in their private lives in conflict with cases they hear as members of the Body. It appears that Appellate Body members are not to receive a salary; rather, DSU Article 17:8 provides that they are to receive their expenses.

The qualifications for members of the Appellate Body are open-ended. Article 17:3 provides as follows:

> "The Appellate Body shall be comprised of persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. They shall be unaffiliated with any government. The Appellate Body membership shall be broadly representative of membership in the [WTO].

The scope of the Appellate Body's determinations is limited to "issues of law covered in the panel report and legal interpretation developed by the panel." We cannot be sure what this means exactly, but it appears to be similar to the type of review conducted by American courts of appeal.

The DSU provides that the Appellate Body is to be provided "with appropriate administrative and legal support as it requires." DSU Article 17:7. This provision obviously assumes both a clerical and a substantive legal staff; exactly what is meant by this provision will probably first be discussed at the GATT Ministerial meeting to plan for the transfer of functions from the GATT to the WTO later this year.

There is no counterpart for the Appellate Body in current GATT practice. It is unclear exactly what its function is to be, but it certainly could be a kind of offset for the reversed consensus rule, an additional check if you will on the new-found authority of panels. Much of its success depends, I should think, on the abilities of the members of the Appellate Body and the quality of its decisions.

Procedures for Measuring Compensation and Retaliation.--Most cases arising under the GATT system (that is, the GATT and the Tokyo Round Codes) have not resulted in either compensation or retaliation. In a few cases, the offending practice has simply remained in place, and the complaining government remained unsatisfied, but unwilling to retaliate. In many more cases, the defending government has made enough of a change in its practice to bring it into conformity with a panel report, or at least enough change to quiet the claims of the complaining government.

Under the WTO, however, a new procedure is created to monitor compliance and measure the appropriate level of compensation or retaliation.

DSU Article 21:3 provides that within thirty days after a final ruling by the panel or the Appellate Body, as the case may be, a member against whom a ruling has been made must announce what it plans to do with respect to implementing the ruling or recommendation. The time for this report is extendible for a reasonable period of time, which is elaborately defined as a time set by binding arbitration, generally 15 months, or a period of time agreed to by all the members of the DSU. DSU Article 21:5 provides for a new, fast-track dispute settlement proceeding before the old panel in cases where there is disagreement as to whether the respondent government's actions actually bring it into compliance with a panel report.

In the event, there is not compliance with the panel report, then the losing respondent is required to enter into negotiations with the winning complaining party if asked. DSU Article 22:2 provides as follows:

> "If no satisfactory compensation has been agreed within twenty days after the expiry of the reasonable period of time, any party having invoked the dispute settlement procedures may request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements."

DSU Article 22:6 provides as follows:

> "When the situation described in paragraph 22.2 above occurs, the DSB, upon request, shall grant authorization to suspend concessions or other obligations within thirty days of the expiry of the reasonable period of time unless the DSB decides by consensus to reject the request. However, if the Member concerned objects to the level of suspension proposed, or claims that the principles and procedures set forth in paragraph 22.3 above have not been followed where a complaining party has requested authorization to suspend concessions or other obligations pursuant to paragraph 22.3(b) or (c) above, the matter shall be referred to arbitration. Such arbitration shall be carried out by the original panel, if members are available, or by an arbitrator appointed by the Director-General and shall be completed within sixty days of the expiry of the reasonable period of time."

The issue in such a proceeding is the level of retaliation that is "equivalent to" the nullification and impairment, not the nature of the retaliation to be used. This is important because the point of retaliation is to put pressure on the offending country by putting in conflict the interests of exporters with those of importers in the offending country. The change effected by these provisions as compared to the GATT is that the WTO would provide a process other than simply negotiation to work out what the appropriate level is. This determination is as binding on the parties as the underlying substantive decision itself, that is, parties to the WTO are agreed by the terms of DSU 22:7 not to seek a second arbitration and the DSU "shall upon request, grant authorization to suspend concessions or other obligations where the request is consistent with the decision of the arbitrator, unless the DSB decides by consensus to reject the request."

Analysis.--There remains the question of whether these undertakings would be comparatively better from the U.S. standpoint than remaining with the existing GATT system (assuming that were politically possible, which is not at all certain). I am sure that that question cannot be addressed fully by a lawyer, but let me give you what I believe is a reasonable lawyer's answer for the United States and then add some comments as an observer of American trade policy, which I hope will be helpful to the Committee.

I begin from the proposition that the United States is a major -- probably the major -- force for economic "good" in the world economy today. That responsibility was thrust upon us during and after the Second World War, but we have accepted it and for the most part supported the rule of law in international relations, encouraged the development of market economies everywhere in the world, donated huge sums to foreign aid, and liberalized our import regime to a far greater extent than any country in the world. There will be occasions when defending our national economic interest means doing something that is not exactly enlightened, but those occasions are few and far between compared to those occasions when our international economic policy is consistent with the best ideals of the founders of the post-War international economic system.

For this reason, I think it is important that the United States be able to achieve its objectives in the face of widespread opposition, especially when that opposition is essentially intent on distorting trade rather than liberalizing it.

Today, our ability to succeed in negotiations in which we are often isolated depends upon our economic power. The United States is the world's largest exporter and its largest importer in terms of dollar value, and, in fact, in most other terms as well. If we wish to withhold access to our enormous domestic market as leverage to achieve our objectives, many other countries will have to find a way to address our concerns to our satisfaction. As long as we are seeking change that improves human welfare by liberalizing trade, that strategy is a reasonable exercise of our power. However, we cannot make such a threat every day. As a practical political matter, Presidents of the United States regard decisions about trade retaliation as major international policy questions, and some very deserving but politically sensitive cases of foreign trade distortions have never received attention on their own merits.

In any event, aside from whatever failings there are in our global economic objectives -- and there surely are some -- as framers of the formula for what is good for the world, we are not in the same relative economic position with respect to trade as we were 45 or even 20 years ago, and we project those relative economic relationships forward unchanged at some substantial risk. We are already aware that the European Union is unwilling to respond to our unilateral pressure in many circumstances, and as a new, confident and somewhat forgetful (if not ungrateful) generation begins to take charge in Japan, we can see signs of a similar resistance there.

This trend of changes in relative economic power will probably continue for some time to come. In fact, it probably has been going on for some time now, but perhaps the unifying effect of confronting Soviet tyranny masked its development. In any event, we have to look realistically at how much longer it is in our interest to use the leverage of our marketplace to achieve our objectives.

In making this evaluation, it is clear that for some time at least, we must reserve the power to take action unilaterally to defend critical economic interests. We must be in a position to do this even if it is inconsistent with our obligations under the WTO. There is nothing under the DSU or any

other part of the WTO that prevents our taking such a unilateral action. Of course, we have to be prepared to face the consequences of acting in a manner that is inconsistent with our obligations, but that is true even under the current regime. Section 301 was amended in 1988 to provide as follows:

> "The Trade Representative is not required to take action . . . [if] the Contracting Parties to the General Agreement on Tariffs and Trade have determined, a panel of experts has reported to the Contracting Parties, or a ruling issued under the formal dispute settlement proceeding provided under any other trade agreements finds, that (i) the rights of the United States are not being denied, or (I) the act, policy or practice -- is not a violation of, or inconsistent with, the rights of the United States, or (II) does not deny, nullify or impair benefits to the United States under any trade agreement . . . ." 19 U.S.C. § 2411(a)(2)(A).

Thus, it will not be much more of an issue to act inconsistently with a panel ruling under the WTO than it already is today. In practice, however, there are in my opinion much more important issues for the Committee to consider in this situation.

First, it is clear that the combination of an integrated dispute settlement system; the reversed rule of consensus, the Appellate Body and the detailed rules for compensation and retaliation, add up to a strengthened position for complaining parties as compared to the current system. Under the current system, complaining parties are really completely frustrated, so it does not take much to make their situation better. The fact is that as the world's largest exporter, not just of goods, but of other economically valuable matter that will, for the first time, be protected by the WTO, such as intellectual property, we have always been, and still are, much more frequently a complaining party than we are a defending party.

Second, the old verities of international trade disputes remain, especially the one that says retaliation is a good threat but a lousy remedy. If my client making typewriters is having trouble selling them in Germany because of standards barriers, it will not help my client at all for the United States government to limit imports of German trucks. Our objective in dispute settlement is to remove obstacles to our exports, and to defend our legitimate current policies when attacked. We are, or should be, mainly focussed not on retaliating, but on achieving these objectives. If we retaliate, we fail, and I expect that in the future our threat to retaliate is both more credible and more important to the vast majority of WTO countries than are their threats to retaliate against us.

Indeed, the fact remains that under the new DSU, economic power will play a significant role. When the United States is a complaining party and the responding party is the European Union, then obviously our economic power is fairly similar; we cannot retaliate without calculating that the EU will counter-retaliate. I would expect in that situation, we would both prefer to accept the rulings of the panels and the Appellate Body than to act unilaterally.

However, when the United States is a complaining party and the respondent government is a less economically powerful country, a country that takes full advantage of our liberal trade regime by exporting a significant portion of its GNP to the United States but that imports relatively minor amounts from the

United States, the United States has enormous power to persuade that government to change its policies. The fact that the United States acts under the aegis of the WTO will make it easier, in terms of the local politics of that country, to achieve our trade objectives, as compared to a demand from an American official acting solely under Section 301.

And finally, when the United States is a responding country and loses before a panel: If the complaining country is not economically powerful, it will have precious little capacity to retaliate and we will have a significant amount of room in which to negotiate notwithstanding the adverse aspects of the panel report.

In short, I think the risks of this system are manageable, whereas the potential benefits for us are really quite large and even essential. We simply cannot continue to resolve everyday trade barrier problems as major international policy controversies. I would guess, for example, that over the last 20 years, half or more of our trade problems in Japan could have been meaningfully addressed through the WTO had it been in effect. The integration of the system would have allowed us to attack dozens of standards barriers, from baseball bats to beef, without creating a major international incident, and we could have and should in the future retaliate until that barrier has been removed to our satisfaction or the satisfaction of the arbitrator, if it comes to that.

Would we have lost the DISC case and the book manufacturing clause case under the WTO system? Yes, I think we probably would have, but that is really a matter of the interpretation of the substantive rules applicable to both cases under the WTO, which are different from those applicable under the GATT. Assuming for the sake of discussion that the United States would lose those cases under the WTO, we would have the option to appeal, which we cannot do under the GATT; and we would be able to use our economic power to stretch out the negotiations on exactly how we would comply. In the end, remember, the United States changed the DISC and it repealed the book manufacturing clause under the existing dispute settlement system.

Of course, the potential of the DSU as a market-opening tool depends to some extent on the quality of the underlying agreements, which is a subject too broad for this testimony. Let me just say two things about that idea:

First, for all the many failings of the WTO compared to the ambitious U.S. objectives for the Round, it has opened up some truly important new avenues for action in dispute settlement. To cite one very simple example, we now have bindings on large sections of developing country schedules where we had no bindings at all. A binding is the separate commitment not to raise a customs duty above a specific level. It is frequently the case that a nontariff measure nullifies or impairs a binding, so if the offending country has no binding, the United States government may have no case or a weaker case against the nontariff barrier. In this, and a number of other cases, the substantive provisions of the WTO Agreement and its attachments are notably stronger than the current GATT and surrounding agreements, and they thus enhance our chances of using the DSU to achieve our market-opening objectives.

Second, I have considered the new institutional provisions on amendment and waiver to see how they might affect the value of the DSU. Essentially, these provisions allow amendment (which the U.S. or another government might seek if it were unsuccessful as a complaining party) and waiver (which the U.S. or another government might seek if it were unsuccessful in defending a practice), but require a three fourths majority of the WTO membership to succeed. Based on the current likely membership of the WTO, this number is in the high 80's. It is very difficult now to see exactly how likely it is that such a

voting procedure will actually be employed in practice. If several economically powerful countries do not want the procedure used, it is highly likely they can prevent its usage. But even if this voting procedure is eventually used, I see some benefit to the U.S. and manageable risk.

Getting 85 or 86 WTO countries to agree to an amendment is, based on experience, going to be quite difficult. If we take as an example the recent dispute between Latin American countries and the EC concerning bananas, the EC might have calculated that if it combined 69 Lomé countries with its own 12 votes, it could have 81 votes for its position. However, it would have found that several of the Lomé countries are not members of the WTO; and that several others might not support its position on bananas just because of the Lomé Convention. Such coalitions of developing countries were knee-jerk reactions against the United States 20 years ago; today, developing country governments are themselves forming into blocs and coalitions within the GATT to achieve concrete, self-interested ends. Opposition to the United States is not their only foreign policy goal anymore.

On the other hand, as the oldest democracy in the world, this country has more than 200 years of experience in lobbying. It ought to be able, through careful and attentive diplomacy, to manage a proto-legislative WTO, if that is what the organization becomes, and in some cases, another government could become so isolated that the United States would be able to achieve such a super-majority to amend the agreement to attack its practices.

These comments are obviously not a statement that the new dispute settlement system is an unmitigated success; it is a lawyer's risk and reward analysis. On that basis, the new system is unquestionably a better system for the United States. However, how good the system is for the United States depends to some extent on the vigor with which our government and private sector implement these provisions. If I may, I would like to make some personal observations on this subject to close my testimony.

Implementation is too large a subject to discuss here, but I want to foreshadow a few ideas about it because these issues often become confused with the underlying merits of any particular dispute settlement system.

First, at the international level, it is vitally important to assure high standards and objectivity in the panels and especially in the new Appellate Body. The United States has an interest in this subject because we are going to be increasingly dependent in the future on the substance of these bodies' rulings in cases our government initiates. Ensuring high quality will require attention to the details of appointments; procedural rules for panels and the Appellate Body; and money, to support the operation of these institutions.

Second, from the domestic U.S. perspective, the United States is, as I have said, much more often the complaining party than the defending one, but in general we still devote too few resources to the identification and development of both our attacking and defending positions in these matters. No one knows better than this Committee the staffing limitations of the Office of the U.S. Trade Representative, but under the WTO these limitations could become serious obstacles to taking full advantage of the market-opening potential of the DSU.

That completes my prepared testimony. I appreciate being invited to discuss this important subject with the Committee, and I remain available to help you in your deliberations in any way I can.

#600565431

Mr. MATSUI. Dr. Lovett.

STATEMENT OF WILLIAM A. LOVETT, J.D., PH.D., JOSEPH MERRICK JONES PROFESSOR OF LAW AND ECONOMICS, TULANE UNIVERSITY, SCHOOL OF LAW, NEW ORLEANS, LA.

Mr. LOVETT. Thank you very much, Mr. Chairman. I appreciate being here with the committee.

Just 2 months ago, I came to Washington for the annual American Society of International Law meetings. A principal speaker in a key panel was Professor John Jackson, a leading expert on the GATT. He said, in summing up the GATT 1994 arrangement, "This agreement far exceeded our expectations." In addition, "It is of truly constitutional importance." In other words, as an enthusiast for strengthening multilateral disciplines, in his language, he thought this was a great and fundamental breakthrough toward world government.

I sat here for 2 hours listening to Ambassador Kantor and I must say that he is, if not consciously dissembling, he is very substantially understating the constitutional, legal, political and economic implications of GATT 1994.

What GATT 1994 is about is institutionalizing a Brussels-like, European-style elitist bureaucracy, oriented especially to the interests of multinational corporations, and not very sensitive to many of the interests which are important in the United States. They have a very activist agenda in their many GATT task forces, working parties, and so forth. It runs through banking, insurance, franchising, shipping, securities, investment, manufacturing, many other services, even such matters as plurilateral standards for antitrust.

Now, the question is not really whether there is a technical loss of sovereignty here. Minority Whip Gingrich, in his colloquy with Ambassador Kantor, I think clarified that situation nicely. The real issue is whether or not the United States greatly weakened its de facto bargaining leverage by offering to go under GATT 1994, as opposed to staying in GATT 1947.

The central theme of my testimony—and I appreciate the privilege of giving you a lot of documentation—is that the United States has lost ground by going into GATT 1994 as opposed to GATT 1947. To appreciate that, we have got to run through key features of the arrangement.

First, the subsidies discipline, so-called: Through the history of the GATT, but even more so now, there is a double standard. The kind of subsidization used for economic development—Europe, most developing nations—is totally unassailable under the GATT. Our society finds it difficult in a Federal democracy to do that kind of explicit subsidization. There is virtually no effective right left for the United States to complain about subsidies under GATT 1994.

In dumping, we have substantially weakened an already difficult, highly expensive, awkward remedy that rarely helps an injured American business. On 337, we made crucial concessions at the outset and have substantially weakened, in fact emasculated, that provision with much discontent in the intellectual property community.

With respect to 301, although Ambassador Kantor claims it is still in the closet, in fact, if you look at the reality of our having greatly weakened our trade bargaining position so comprehensively in GATT 1994, that we lock ourselves into a position where if we resisted and used 301 actively, we would find ourselves defendants in a dispute settlement process where, as the committee's discussion has explained, we would very likely lose without any effective response.

Now, what should we have been doing in the last 12 years, the gestation process for GATT 1994?

It is worth thinking about what happened to the U.S. economy. The explicit argument by many who wanted the Uruguay round effort and who did support the limited end result of GATT 1994 was to try to save the world economy from collapse, a disaster of depression and protectionism. In fact, the last 12–15 years have seen an enormous expansion of the global economy under GATT 1947 rules.

But the United States failed to use effectively its bargaining leverage; and we let our trade deficits, along with our budget deficits, get badly out of hand. We accumulated $1,400 billion of trade deficits, $1,100 billion of current account deficits, $3,500 billion of budget deficits. We switched from the biggest creditor nation in the world, so that we now have roughly $850 billion net debt owed to the rest of the world, on which we have got to pay $60 billion a year in debt service charges.

We lost 10 million jobs. Our real unemployment rate is probably 10 percent. We have very tough times for the 20-something generation, a very difficult job market. Since 1973, real wages in the United States have been stagnant. There are growing class divisions, painful conflicts and increasingly severe crime and drug problems owing to our lack of adequate job opportunities.

What went wrong? Basically, we lost the teamwork that we held between 1946 and 1973, in which we maintained our fiscal, monetary, wage price—and most crucially—trade balance discipline. And in the 1970s, we tried to fight inflation ineffectually; in the 1980s, we finally got it done, but with an awkward blend—very high interest rates, and massively excessive foreign borrowing. In other words, we began to violate a crucial requirement of good, sound economic policy that the IMF likes to impose on most countries in the world to their good advantage.

We lost our trade balance discipline. What we should have been doing with the GATT 1994 effort is to restructure the U.S. balance of trade leverage, so that we could restore effective industrial performance for this economy in the world market. Instead, we have become a sick man in the world economy, and the GATT 1994 does very little about it. GATT 1994 achieves virtually no gains of any significance beyond precatory language in the services sector, and very little in agriculture. In fact, we open the door to more substantial, heavily subsidized agricultural exporting from many developing countries under GATT 1994.

In the dumping, in the safeguard area, we have lost ground. With respect to the voting regime and dispute settlement, we have entrenched a framework that marginalizes U.S. influence, and leaves the developing countries and Europe with its core of 13

votes, 10 to 15 additional candidates, and a large proportion from time to time of Lomé Convention states, pressured and influenced to a vote for many tactical purposes with Europeans. This is not an accomplishment which meets the needs and objectives of U.S. trade policy for the mid-1990s.

Further, if we look more carefully at the broad attitudes of the American manufacturing community, agriculture, labor, the environmental community, and I would say moderates from both parties, GATT 1994 has little support. They don't understand the technicalities of the GATT. And the mayors and leaders of many cities in America, if they adequately appreciated what the GATT fails to do and how it continues an overall environment in which the U.S. industrial base will further decline—if they adequately realized that fact, we would make the members of this committee and the Congress understand what a dreadful mistake and lost opportunity is involved in GATT 1994.

Now, delaying or blocking GATT 1994 is hardly the end of the world. Quite the contrary, the world economy, with a lot of global multinational corporations and massively increased trade flows, is well established and secure. All of that happened under the GATT 1947 framework.

The GATT 1947 framework emerged because it was a compromise back in 1947 between two radically different kinds of countries. One very rich country, the United States, came through the war greatly enhanced in production and living standards. On the other hand, there were many weakened European countries, a devastated Japan, and for the most part relatively poor Latin American or former colonial States scattered through the globe. A symmetry and unequal openness, "trade not aid," made sense in that era.

But for the last 20 years, the United States has been going along with an increasingly outmoded, asymmetrical trade policy. GATT 1994 only entrenches that asymmetry.

Therefore, I would suggest to this committee the best policy is to hold open the hearings and broaden them. Keep this discussion alive for at least 18 to 24 months so you get a full agreement, which I doubt you could ever get, on whether or not GATT 1994 should be accepted by Congress. As it stands, GATT 1994 is a black box with a free trade label on it. It is being rushed through with virtually no detailed analysis or broad discussion in the press. Most of the public does not understand GATT 1994.

It would be sad for Congress to miss the opportunity to restore a stronger trade policy.

Thank you.

Mr. MATSUI. Thank you very much, Dr. Lovett.

[The prepared statement and attachments follow:]

Statement of Dr. William A. Lovett[1]

U.S. House Ways and Means Committee, June 10, 1994

GATT - 1994 - A Bad Deal for the United States

Successful economic policy has four dimensions: Fiscal Discipline; Monetary Discipline; Wage-Price Discipline; and Trade Balance Discipline. When all four are properly coordinated a country can achieve good economic growth, improving productivity, and reasonably full employment. Post-war U.S. economic policy was successful when all four worked together between 1946-73. Postwar German and Japanese policy kept these four elements together between the 1950's-1980's. But the U.S. began to stumble in the mid-late 1970's when it lost fiscal, monetary, and wage-price discipline--stagflation followed. The U.S. stopped inflation with very tight money and heavy foreign borrowing in the 1980's, but we lost our fiscal and trade balance discipline. The twin deficits--budget and trade--mounted badly in the 1980's, and they have continued into the 1990's. Since 1992 we've made some progress toward fiscal discipline, and the public supports an effort toward deficit reduction. The public also understands the need for trade balance discipline, stronger U.S. trade policy, and substantially improved jobs performance. Sadly, however, the 1994 Uruguay GATT Round failed to deliver what we badly need--trade balance discipline and a level playing field in the world market.

© William A. Lovett, 1994

GATT 1994 - A Bad Deal for the United States

Unfortunately, GATT 1994 is a net loss for U.S. trade, industry, employment, agricultural and environmental interests. But GATT 1947 is still workable, and provides a lot more "flex" for vital U.S. trade interests. Therefore, Congress should reject GATT '94, and leave GATT '47 in force for the U.S. This will be a much better trade regime for the American people, and a better balanced framework for healthy trade flows in the world economy.

I. **GATT '94 Is Not Really A Free Trade Agreement** - GATT '94 doesn't create balanced, reciprocal free trade in the world economy. No--GATT '94 is a one way straight jacket for U.S. trade interests. GATT '94 greatly aggravates the asymmetry problem, i.e., the unlevel playing field, a central problem for U.S. industry, services, labor, and agriculture in world trade. GATT '94 also entrenches U.S. trade and current account deficits, making it impossible to eliminate these tragic problems for the U.S. and its key trade partners.

II. **Modern History Teaches that Unilateral and Unequal Trade Open-ness Is Self Destructive** - Britain had a big lead in industry, shipping, trade and finance in the early mid-19th century. But Britain's use of unilateral free trade, when key rivals (the U.S., Germany, and Japan) used tariffs to stimulate industry, was a big blunder. The only saving grace for Britain was their colonial empire, which allowed cheap raw materials and secure exports. But by the 1920's Britain's industrial base was in big trouble. Only Imperial Preference tariffs in the 1930's saved enough British industry to revive so they could withstand Hitler's onslaught. The Americans had a comparable big lead in technology, industry, shipping, and finance after World

---

1. Joseph Merrick Jones Professor of Law and Economics, Tulane Law School, New Orleans, LA 70118-(504) 865-5960.

War II. But by the later 1970's this lead had run out, and serious competitiveness problems for U.S. industry were developing. The last 15 years have seen major U.S. neglect, and a failure to enforce overall trade balance by the U.S. government.

III. **GATT '94 Failed to Achieve the Top Priority Objective for U.S. Trade Policy in the 1990's** - The top priority objectives for U.S. trade-industrial policy should be: 1) Rapidly eliminate the U.S. trade and current account deficits. Between 1982 -94 the U.S. has suffered $1,300 billion of accumulated trade deficits, and $1,000 billion of current account deficits. During this period the U.S. went from the world's biggest creditor to become the world's largest debtor. The net external debt of the U.S. may be $-850 billion, which requires $50-60 billion of debt service charges annually. This country gave up a sizeable chunk of its industry, exports, and jobs in accepting this transformation. Reasonable estimates would be a net loss of at least 5-10 million good jobs for Americans, or $150-$500 billion of annual income for this economy. 2) U.S. trade policy should level the playing field, reduce excess imports, and strengthen the enforcement of U.S. trade law remedies. Industrial policies and restricted imports are widely established in most developing countries and Japan. Merely asking countries to open their markets has been naive, and failed miserably. By contrast, during the last 10-15 years Japan and the EC have skillfully defended their industrial and trade interests. They played it smart. The EC maintained adequate overall trade balance, while Japan has earned very large trade surpluses for more than a decade.

IV. **GATT '94 Badly Aggravates the Asymmetry Problem for U.S. Trade and Industry** - GATT '94 greatly weakens U.S. trade law remedies, and largely eliminates effective American leverage to correct current trade imbalances. Anti-Subsidy, Antidumping, Section 337, and Section 301 remedies are greatly weakened. The U.S. gets very little of real value in return except vague and precatory language. In fact developing country authority to protect and subsidize their industry, service markets, and agriculture is strongly assured. Europe and Japan don't really change their partial open-ness, restrictions, and subsidies. Most of the GATT '94 concessions in the end were made by the U.S. as in previous GATT rounds.

V. **GATT '94 Creates a World Trade Organization and Dispute Settlement System that Greatly Prejudice U.S. Trade and Industrial Interests** - The WTO voting regime and Dispute Settlement Process greatly disfavors U.S. interests. The U.S. gets only 1 vote in the WTO, while the EC gets 13 votes directly, 10-15 more votes through countries eager for EC membership, and 40-50 more Lomé convention states (former colonies) under significant EC influence. Meanwhile, developing countries as a bloc get an even stronger majority. The WTO's Dispute Settlement Process provides for mandatory arbitration by WTO Panels, selected to reflect the GATT membership. In effect, the GATT '94 allows U.S. trade partners to frustrate, greatly delay, and largely eliminate any effective U.S. trade law relief. This is a straight jacket that aggravates and locks into place major and damaging asymmetries in world trade, and strongly disfavors U.S. economic interests.

VI. **U.S. Interests Are Much Better Served If Congress Rejects GATT '94 and Retains Its Rights and Leverage Under GATT 1947** - By rejecting GATT '94 the U.S. preserves stronger trade law remedies against subsidies, dumping, anti-competitive and unfair trade practices under Sections 321, 331, 337, 301 and Super 301. The U.S. can also employ GATT Article XII - Balance of Payments Relief (Section 122

under U.S. trade law). This is much stronger U.S. bargaining leverage and import restriction relief than would exist under GATT '94 for the U.S. In addition, stronger safeguard and volontary restraint agreement (VRA) relief would also continue for the U.S. under GATT '47, whereas GATT '94 largely eliminates these policy instruments for the U.S. Thus, the U.S. preserves its effective trade independence and full sovereignty under GATT '47.

U.S. manufacturing, industry, and agriculture are substantially better off under GATT '47 than GATT '94. U.S. labor, jobs and employment prospects are substantially better safeguarded under GATT '47 than GATT '94. And U.S. environmental interests are much better defended under GATT '47 than GATT '94. Because U.S. economic growth, balance of payments, and overall macro-performance will be substantially improved under GATT '47 than GATT '94, U.S. consumer welfare is enhanced by preserving GATT '47 and rejecting GATT '94.

The U.S. Congress has a choice between two broad scenarios in dealing with GATT '94. If we reject GATT 1994 for the U.S. and retain GATT 1947, a stronger U.S. industrial recovery, with more jobs, and better living standards for Americans will follow. But if Congress should rush ahead and foolishly approve GATT '94, the U.S. economy, industry, jobs, and overall incomes will be appreciably weakened. The U.S. will lose effective control over its trade flows and external economic relations. Most Americans clearly would lose out under GATT '94, whereas under GATT '47 the U.S. can do substantially better in its engagement with the world marketplace.

© William A. Lovett, 1994

Problems in the 1994 Uruguay Round Deal and Proposed World Trade Organization (WTO)

1) Voting Imbalance Problems - The U.S. gets only 1 vote in the new World Trade Organization (WTO). But the European Community gets 13 votes (12 plus 1), together with 10-15 EFTA and former East bloc states eager for EC membership. In addition, the EC has major influence in many former colonies (often weak and with special links to European states). Thus, Europe may enjoy an effective voting majority. In addition, from another perspective, the developing nations enjoy an even stronger voting majority. This voting imbalance (like the UN's General Assembly) seriously hurts the U.S., because both of these blocs will seek to maintain their advantages in an asymmetrical or unequally open GATT trading regime.* Compare the better

---

* The GATT 1994 Dispute Settlement provisions establish binding arbitration by GATT panels (selected to reflect overall GATT membership). Decisions by GATT panels and its new Appellate Review Body are final, and could only be overturned by "consensus" or unanimous votes of the Dispute Settlement Body (the entire GATT membership). Any significant U.S. restrictions on imports to enforce rights under U.S. national trade laws, i.e., Section 301 rights, or unfair trade practice remedies (antidumping, countervailing duties for subsidies, and Section 337 relief to protect intellectual property rights) are likely to be challenged, delayed, or limited under the new GATT 1994 dispute settlement process. Countries complaining about any such restrictions by the U.S. only need to launch a dispute settlement proceeding under the proposed GATT 1994 Dispute Settlement process.

balanced IMF "weighted voting" regime based on national GNP - financial strength quotas. In the IMF there are 24 Executive Board positions - one for the U.S. alone, but the industrial and financial nations have the majority of quota voting power. The U.S. also has a 17% IMF quota itself, which represents the largest single block of votes. The U.S. does not have to accept such a bad GATT deal on voting, which would marginalize U.S. influence in the World Trade Organization (WTO).

2) Weakened U.S. Safeguarding - U.S. authority to safeguard important manufacturing interests under GATT Article XIX and through VRA's (voluntary restraint agreements) is substantially reduced under the GATT-1994 and WTO dispute settlement provisions. There are insufficient and only illusory gains for the U.S. in other areas (agriculture, services, and TRIP's). The existing 1947 GATT Safeguard regime is better for the U.S. and many other countries.

3) Weakened U.S. Unfair Trade Practice Remedies - U.S. antidumping remedies, countervailing duties for subsidy, and Section 337 (intellectual property protection) relief are weakened substantially under the GATT - 1994 and WTO dispute settlement provisions There are insufficient and only illusory gains for the U.S. in other areas (agriculture, services, and TRIP's). The existing 1947 GATT unfair trade practice regime is better for the U.S. and many other countries.

4) Weak Attempted Disciplines Against Foreign Subsidies - The supposedly "prohibited" subsidies involved in the GATT - 1994 regime are domestic content laws and export performance requirements (often used in regulating foreign investments, especially by developing countries). But large loopholes, even for these subsidies, are provided for less developed countries, along with generous delays for compliance. Although other subsidies may still be actionable occasionally under GATT Article VI countervailing duty proceedings,* the burdens of proof for successful plaintiffs become significantly more difficult under GATT - 1994. Finally, very broad latitude is reserved for economic and regional development subsidies which become non-actionable under GATT - 1994. For practical purposes, the new GATT - 1994 subsidy regime is a major net loss for the U.S.

5) Weak and Largely Illusory Gains for U.S. Agriculture - Great hopes for U.S. gains in agricultural exports were raised by USTR Clayton Yeuter in the mid - 1980's when the Uruguay Round was launched. The Cairns Group (of 14 other agricultural exporting countries) were hopeful, too. But European Community (EC) resistance was very strong, and the resulting Blair House accords (Dec. 1992) incorporated into the GATT - 1994 deal provided only modest gains. The EC conceded only a 21 percent reduction in key agricultural subsidies over 6 years. No surprise -- the majority of EC countries have very powerful farm lobbies. In addition, the

---

NOTE - Further details on the Uruguay GATT Round 1994 are explained in William A. Lovett, "The Current World Trade Agenda: Asymmetry Problems, Regionalism, and the Uruguay GATT Round," Fordham Law Review Symposium, 50th Anniversary of the Bretton Woods Conference, May, 1994, (forthcoming). For a recent policy overview, see William A. Lovett, "Rethinking U.S. Industrial Trade Policy for the Post-Cold War Era," Tulane Journal of International and Comparative Law, May, 1993. For historical background on trade policy, see William A. Lovett, World Trade Rivalry: Trade Equity and Competing Industrial Policies, Lexington Books - Free Press, 1987. All of these sources provide extensive citations to the trade and industrial policy literature.

GATT - 1994 deal provides strong preferences for developing country agricultures, their exports, and broad freedom for LDC farm subsidies. For these reasons U.S. agriculture is a substantial net loser under the GATT - 1994 deal.

6) Weak and Largely Illusory Gains in Services - The other major area of U.S. hoped for gains in the Uruguay GATT Round was Services. American banks, insurance companies, movie and recording outfits, and lots of other service providers thought a major breakthrough could be achieved in expanded U.S. service exports. But these hopes proved to be greatly overblown. Europe and Japan already have highly developed banks, insurance companies, financiers, entertainment and media outfits, and most other service providers. They offer tough service competition in their own markets and other parts of the world. U.S. gains in those service markets will be modest, whereas the GATT - 1994 deal opens up U.S. service markets to national treatment for strong foreign competitors. Meanwhile, most developing country financial and other service markets remain largely closed or restricted under the GATT - 1994 deal through a combination of strong preferential language favoring LDC's and/or national reservations to commitments.

7) Losses and Largely Illusory Gains in Intellectual Property - Another area of hoped for gains in the Uruguay GATT Round was intellectual property. Many developing countries failed to respect U.S. intellectual property (patents, trademark, and copyright) interests, although the U.S., Japan, and EC generally provide adequate protections in this area. Unfortunately, the U.S. agreed to weaken substantially the strongest unfair trade practice remedy (Section 337 proceedings), a net loss for American industry, and the TRIP's portions of the GATT - 1994 agreement provide mainly vague, largely precatory understandings that fail to implement comparable and readily enforceable protection for U.S. intellectual property rights abroad.

Conclusions

U.S. trade, manufacturing, and industrial interests are not well served by the 1994 Uruguay GATT Round deal as presently negotiated and offered to Congress. Voting Imbalances, Weakened Safeguard Relief, Weakened Unfair Trade Practice Remedies, Inadequate Discipline Against Foreign Subsidies and Targeting, together with Weak and Largely Illusory Gains in Agriculture, Services, and Intellectual Property, all justify rejection of the proposed 1994 GATT Round Deal and its proposed World Trade Organization (WTO)

At the very least, Congress should take a year or two for careful, comprehensive, and detailed hearings and reports on every and all aspects of the 1994 GATT Round deal. U.S. agriculture, manufacturing, and service interests are badly served by this GATT deal. U.S. labor and working people also lose out in this GATT deal, and the trend to moving jobs into lower wage countries will be accentuated. Environmental interests lose world wide in a GATT deal that systematically neglects and over-rides environmental interests. A good and fair hearing should be provided to encourage broad discussion, improvements, and a better GATT trade regime for the coming years.

Why did the USTR's staff develop and sign this deal? The answer lies in a complex web of MNC and GATT - expert special interest politics. Few people in the world understand the highly technical, accumulated language of the GATT (1947), as supplemented by successive GATT Round agreements (with extremely complex networks of diverse concessions). We should realize that a narrow and limited fraternity of multilateral trade negotiators, together with a growing, though still small body of international trade

lawyers, now dominates this arcane field. Most members of Congress have not read the GATT, the subsequent agreements, and the 1994 GATT Round Final Act. Very few economists and journalists have read this material. Nor will they have the opportunity for any real study of the new GATT if Congress rushes ahead this summer and accepts the GATT deal without extensive review. Congress and the American people should not buy a pig in a poke.

The main reasons the USTR's staff went ahead to sign this GATT 1994 agreement were: (1) The USTR committed the U.S. last spring to sign a GATT deal on a date certain, Dec. 15, 1993, when many key details of this deal were still unresolved. This was poor bargaining strategy, and the U.S. got the short end of the stick. (2) The U.S. had built up prior expectations (in previous GATT Rounds) that the U.S. would make the crucial concessions of last resort to "Save the GATT Round and the World Trading System." But these fears of trade breakdown were grossly overblown.

In fact, the global trading system is now very well established, and stronger than ever. The existing 1947 GATT (supplemented by later agreements), while not perfect or fully balanced, is still adequate, workable, and it provides sufficient "flex" for advanced industrial nations and developing countries alike.

While a more level playing field for global trade makes sense, and might still be achieved, the 1994 Uruguay GATT Round deal fails to accomplish this vital objective. What the 1994 GATT deal really does (along with its World Trade Organization - WTO) is to entrench an asymmetrical and unequal trade openness, with even greater difficulty for the U.S. in using its national trade laws and their bargaining leverage. Consequently, this proposed GATT 1994 deal fails to achieve legitimate and proper U.S. trade policy goals. It ignores and entrenches long-term U.S. trade and current account deficits. U.S. trade and current account deficits have become greatly excessive, and cumulatively very damaging to the economic and industrial interests of all Americans and U.S. national security interests. The Uruguay GATT 1994 deal is bad trade policy for the people of the United States, and it should not be accepted by Congress.

© William A. Lovett, 1994

American Industrial Revitalization Needs A Realistic Trade Policy

The United States Should Restore Balanced Trade and Rejuvenate Our Industrial Base

Between 1981-94, the U.S. accumulated $1,450 billion of trade deficits, $1,150 billion of current account deficits, and $3,500 billion of additional federal budget deficits.

We transformed the world's biggest creditor nation into its largest debtor with roughly -$850 billion of external indebtedness. Gridlock and fiscal neglect combined with timid trade policy to weaken America's industrial base, and greatly reduce economic growth. We lost at least 5-10 million American jobs.

Between 1940-73 American productivity growth averaged 2.8 percent annually, but between 1974-92 our growth slumped to 1.2 percent annually. If we had maintained previous growth rates, U.S. per capita incomes would have been 25 percent higher today, and we would enjoy substantially fuller employment. Widespread U.S. unemployment, poverty, and crime would be a lot easier to deal with if the U.S. could rebuild its industrial prosperity.

I. The U.S. Must Renew Its Long-Term Productivity Growth with a Comprehensive Industrial Rejuvenation Effort.

Some fiscal progress is being made by the Clinton Administration, with gradual deficit reduction -- increased taxes and reduced spending. But more fiscal discipline will be needed, especially in the health care sector. U.S. health care costs now exceed all other nations and reached 14 percent of GNP in 1993-94.

But the recent NAFTA and Uruguay GATT Round Agreements are not sufficient to Restore Balanced U.S. Trade, especially with stubborn trade surplus countries. Stronger U.S. trade bargaining must be used on countries with sustained trade surpluses against the U.S. It's not enough merely to ask for increased U.S. exports. This strategy has not worked.

The time has come to start cutting excessive U.S. imports now, especially against U.S. trade partners with large and sustained trading surpluses earned against the U.S. over the last 10-12 years. As key trade surplus countries learn they will lose exports to the U.S., their need to increase imports from the U.S. will become manifest to them.

II. Long-term U.S. Historical Experience, from 1791-through the post-World War II era, demonstrated that a sound industrial development policy is a moderate and revenue oriented tariff structure.

Tariffs provided crucial incentives and reasonable safeguarding needed to foster American manufacturing from 1791-1860, and even more strongly between 1861-1945.

A big domestic market, a large and productive land area, and a rapidly growing population allowed U.S. tariff policy to be extremely successful. By the end of the 19th century U.S. manufacturing was taking the lead from British industry. German and Japanese tariff policy helped create strong industrial networks, too.

British trade policy was increasingly controversial from 1900-1931, and they finally realized that Imperial Preference Tariffs (at moderate levels) were essential to offset the industrial protection and growth achieved by the U.S., Germany, and other nations in the 1880's-1920's.

British Imperial Preference Tariffs (at moderate levels) between 1932-40 greatly revived British and Commonwealth industry, just in time to allow Great Britain to withstand Hitler's onslaught.

III. Post-World War II U.S. Trade Policy Failed to Enforce Reasonable Reciprocity.

The GATT (1947) encouraged a series of tariff reduction rounds between 1947-1994. But developing countries (not unreasonably, at least until the 1970's-80's) were allowed more latitude to use import restrictions than affluent industrial countries.

U.S. led trade policy also encouraged European economic integration, although significant asymmetry was accepted by the U.S. in the Kennedy round (1962-67) with more heavily subsidized smaller farms - the EEC's Common Agricultural policy.

While the U.S. attempted to level the trade playing field in the 1974-79 Tokyo round negotiations, this effort largely failed. Supplementary Codes (Antidumping, Subsidies, Procurement, etc.) failed to discipline non-tariff barriers (ntb's), subsidies, and restrictive practices.

Growing U.S. industrial competitiveness problems in the 1970's were masked by OPEC I and II oil price increases, which impacted Japan, Europe, and many NIC's (new industrial countries) more heavily than the U.S. Thus, the U.S. balance of payments did not suffer seriously overall until 1983 and beyond.

U.S. efforts to level the world trade playing field in the Uruguay GATT Round (1982-94, including preliminary initiatives) have been largely unsuccessful.

In the final GATT deal negotiated 12/15/93, the U.S. failed to achieve any significant leveling of the international trade field.

o Europe resisted any significant changes in its agricultural subsidies. The Blair House accord provided only 21 percent reductions over 6 years in key export subsidies. And developing country agriculture received increased preferences for subsidies and exports.

o No significant disciplines emerged for industrial subsidies, especially by developing countries. Burdens of proof for countervailing duty proceedings against foreign subsidies increased, thereby substantially weakening U.S. trade law remedies.

o Antidumping proceedings against foreign discounting and targeting practices were made more difficult. This weakens U.S. trade law remedies,already hard to prove and frequently unreliable for many injured interests.

o Opening of foreign markets in the services and intellectual property fields turned out to be modest. But concessions were made to foreign firms in national treatment and access to U.S. markets. Net gains in services are doubtful at best.

o Voting and dispute settlement arrangements in the new World Trade Organization (WTO) give voting control to a strong majority of developing countries. In addition, great influence goes to Europe. A combination of the EC (13 votes), candidates for EC membership (10-15 votes), and numerous former European colonies gives majority influence to Europe on many issues.

o Any significant use by the U.S. of its national trade law remedies (except balance of payments relief) is likely to be delayed, limited, or offset by GATT dispute settlement panels.

o New GATT rules provide for binding arbitration by panels selected to reflect the overall GATT membership (with strong European - influence and developing country majorities).

o Reversal of GATT panels requires unanimous agreement by the Dispute Settlement Body (the entire GATT membership).

In effect, the Uruguay GATT 1994 agreement entrenches the asymmetries and unequal trade openness of the current world trading system, while significantly weakening U.S. national offsets and remedies to foreign unfair trade practices, industrial policy subsidies, and import restrictions.

IV. The Most Successful Long-Term Industrial Development Policy for the U.S. Would be to Re-establish Moderate Revenue Oriented Tariffs.

Heavy U.S. trade and current account deficits since 1983 justify moderate import fees or tariffs under Article XII - GATT (and the new Understanding on Balance of Payments Relief - GATT 1994).

Import fees or tariffs for balance of payments relief along these lines are non-discriminatory and GATT consistent. A basic policy principle of GATT (1947 and 1994) has been non-discrimination, i.e., most favored nation (MFN) treatment.

An additional justification for an import fee or revenue tariff would be as a VAT waiver corrective. Most industrial countries now use a VAT (value added tax) and waive it on their exports, thus they subsidize export sales into countries like the U.S. with no VAT of its own.

A reasonable, revenue-oriented import fee or tariff in the 10-12 percent range would be a sensible encouragement for U.S. manufacturing operations, and an important measure to foster broad U.S. industrial rejuvenation.

A reasonable 10-12 percent import fee or tariff for the U.S. would not present significant burdens upon exports or economic growth for lower wage developing countries. Capital and technology still would flow to developing nations to promote their individual and regional economic progress.

A reasonable 10-12 percent U.S. import fee or revenue tariff would be a market-oriented industrial encouragement. No government decisions are needed to pick winners or select beneficiary industries with general import fees or revenue tariffs. This self-operating encouragement is superior industrial policy.

For the U.S. presently (1994) a 10-12 percent import fee or revenue tariff would generate at least $50-60 billion annually in revenues. This increased revenue would be a major contribution to U.S. fiscal responsibility and deficit reduction efforts.

Industrial revival, expanding job opportunities, and renewal of prosperity for many urban and rural areas is a high national priority for the U.S.[3] A stronger U.S. trade policy that emphasizes GATT - consistent import fees or revenue tariffs would be a crucial contribution to gradually improved economic growth in America.[4] It also would help

---

3. No other credible U.S. government program than broad industrial rejuvenation can do a lot to promote increased "jobs, jobs, jobs." Heavy government subsidies to create industrial employment are unlikely -- big federal budget deficits limit major new outlays, and serious questions are raised about the productivity of large government subsidies to industries ("picking winners"). On the other hand, encouraging domestic industrial output with moderate tariffs or import fees allows individual employers to select their additional employees on a more realistic profit and loss basis. A decentralized, market oriented encouragement is more productive, and most important, the tariffs or import fees add substantial revenues for the U.S. government.

4. An alternative U.S. trade policy would focus U.S. trade sanctions and import fees mainly upon two major trade surplus countries in recent years, i.e., Japan and China. While the U.S. has let trade deficits with Japan, and to a lesser extent, China, get out of hand in recent years, it

restore a level playing field in present world markets, where the majority of nations use systematic industrial policies, trade restrictions, or subsidies for economic development.

V. Special Rejuvenation Efforts are Needed for U.S. Industries Suffering Long-Term Disruption from Foreign Subsidies, Targeting, or Dumping Activities

Some important U.S. industries have suffered cumulative displacement and job losses as a result of widespread foreign subsidies, targeting, or dumping activities (e.g. steel, automobiles, shipbuilding, computer components, consumer electronics, etc.)

U.S. trade law remedies have been left almost entirely to private companies or unions as complainants, with difficult burdens of proof and unlikely relief from government agencies (U.S. Commerce Dept. and International Trade Commission).

While the U.S. would find it too costly and unnecessary to recapture all of these industrial displacement losses and jobs, significant rejuvenation effort is justified in some of these sectors.

Reasonable U.S. import fees or tariffs in the 10-12 percent range would be a helpful incentive for all these recovery efforts. But the U.S. government (through the Commerce Dept.) should make a comprehensive effort to collaborate with U.S. manufacturing trade associations and develop a list of "significantly disrupted" U.S. industries that qualify for (i) supplementary tariff protection to offset accumulated foreign disruptions; (ii) industrial restructuring and rejuvenation efforts with foreign companies selected as American partners for special tariff and other relief; and (iii) collaboration with U.S. state and local governments to foster enterprise renewal zones in areas needing appreciable employment growth.

All these U.S. industrial rejuvenation efforts, regional unemployment relief programs, and offsets to foreign industrial policies, targeting, subsidies, and dumping are consistent with the established GATT (1947), and consistent with U.S. interests under the GATT 1994 Subsidies provisions.

---

could be more pejorative and risky for the U.S. to hit upon East Asia alone. In a post-Cold War World, with less certain multi-polar alignments, it could be unwise and bad foreign policy for the U.S. to focus its trade balance correction efforts solely upon Japan and/or East Asia.

IMF Directory, January 19, 1994

EXECUTIVE DIRECTORS AND VOTING POWER
GENERAL DEPARTMENT AND SPECIAL DRAWING RIGHTS DEPARTMENT

Director *Alternate*	Casting Votes of	Votes by Country	Total Votes[1]	Percent of Fund Total[2]
APPOINTED				
Karin Lissakers *Vacant*	United States	265,518	265,518	17.81
Stefan Schoenberg *Erika Wagenhoefer*	Germany	82,665	82,665	5.55
Hiroo Fukui *Toshihiko Fukuyama*	Japan	82,665	82,665	5.55
Marc-Antoine Autheman *Michel Sirat*	France	74,396	74,396	4.99
David Peretz *John Dorrington*	United Kingdom	74,396	74,396	4.99
ELECTED				
Jacques de Groote (Belgium) *Johann Prader* *(Austria)*	Austria	12,133		
	Belarus	3,054		
	Belgium	31,273		
	Czech Republic	6,146		
	Hungary	7,798		
	Kazakhstan	2,725		
	Luxembourg	1,605		
	Slovak Republic	2,824		
	Turkey	6,670	74,228	4.98
Godert A. Posthumus (Netherlands) *Oleh Havrylyshyn* *(Ukraine)*	Armenia	925		
	Bulgaria	4,899		
	Cyprus	1,250		
	Georgia	1,360		
	Israel	6,912		
	Moldova	1,150		
	Netherlands	34,692		
	Romania	7,791		
	Ukraine	10,223	69,202	4.64
Roberto Marino (Mexico) *Gerver Torres* *(Venezuela)*	Costa Rica	1,440		
	El Salvador	1,506		
	Guatemala	1,788		
	Honduras	1,200		
	Mexico	17,783		
	Nicaragua	1,211		
	Spain	19,604		
	Venezuela	19,763	64,295	4.31

EXECUTIVE DIRECTORS AND VOTING POWER
GENERAL DEPARTMENT AND SPECIAL DRAWING RIGHTS DEPARTMENT

Director *Alternate*	Casting Votes of	Votes by Country	Total Votes[1]	Percent of Fund Total[2]
ELECTED (Continued)				
Giulio Lancinitti (Italy) *Ioannis Papadakis (Greece)*	Albania	603		
	Greece	6,126		
	Italy	46,157		
	Malta	925		
	Portugal	5,826		
	San Marino	350	59,987	4.02
Douglas E. Smee (Canada) *Garrett F. Murphy (Ireland)*	Antigua and Barbuda	335		
	The Bahamas	1,199		
	Barbados	739		
	Belize	385		
	Canada	43,453		
	Dominica	310		
	Grenada	335		
	Ireland	5,500		
	Jamaica	2,259		
	St. Kitts and Nevis	315		
	St. Lucia	360		
	St. Vincent and the Grenadines	310	55,500	3.72
Jarle Bergo (Norway) *Eva Srejber (Sweden)*	Denmark	10,949		
	Estonia	715		
	Finland	8,868		
	Iceland	1,103		
	Latvia	1,165		
	Lithuania	1,285		
	Norway	11,296		
	Sweden	16,390	51,771	3.47
Muhammad Al-Jasser (Saudi Arabia) *Abdulrahman Al-Tuwaijri* *(Saudi Arabia)*	Saudi Arabia	51,556	51,556	3.46
Ewen L. Waterman (Australia) *Amando M. Tetangco, Jr.* *(Philippines)*	Australia	23,582		
	Kiribati	290		
	Korea	8,246		
	Marshall Islands	275		
	Mongolia	621		
	New Zealand	6,751		
	Papua New Guinea	1,203		
	Philippines	6,584		
	Seychelles	310		
	Solomon Islands	325		
	Vanuatu	375		
	Western Samoa	335	48,897	3.28

EXECUTIVE DIRECTORS AND VOTING POWER
GENERAL DEPARTMENT AND SPECIAL DRAWING RIGHTS DEPARTMENT

Director *Alternate*	Casting Votes of	Votes by Country	Total Votes[1]	Percent of Fund Total[2]
ELECTED (Continued)				
A. Shakour Shaalan (Egypt)	Bahrain	1,078		
Yacoob Yousef Mohammed	Egypt	7,034		
(Bahrain)	Iraq	5,290		
	Jordan	1,467		
	Kuwait	10,202		
	Lebanon	1,037		
	Libya	8,426		
	Maldives	305		
	Oman	1,444		
	Qatar	2,155		
	Syrian Arab Republic	2,349		
	United Arab Emirates	4,171		
	Yemen, Republic of	2,015	46,973	3.15
Konstantin G. Kagalovsky (Russia)	Russia	43,381	43,381	2.91
Aleksei V. Mozhin				
(Russia)				
J. E. Ismael (Indonesia)	Fiji	761		
Kleo-Thong Heinkul	Indonesia	15,226		
(Thailand)	Lao People's Democratic Republic	641		
	Malaysia	8,577		
	Myanmar	2,099		
	Nepal	770		
	Singapore	3,826		
	Thailand	5,989		
	Tonga	300		
	Viet Nam	2,666	40,855	2.74
Daniel Kaeser (Switzerland)	Azerbaijan	1,420		
Krzysztof Lank (Poland)	Kyrgyz Republic	895		
	Poland	10,135		
	Switzerland	24,954		
	Turkmenistan	730		
	Uzbekistan	2,245	40,379	2.71
Abbas Mirakhor (Islamic Republic of Iran)	Islamic State of Afghanistan	1,454		
Vacant	Algeria	9,394		
	Ghana	2,990		
	Islamic Republic of Iran	11,035		
	Morocco	4,527		
	Pakistan	7,832		
	Tunisia	2,310	39,542	2.65

EXECUTIVE DIRECTORS AND VOTING POWER
GENERAL DEPARTMENT AND SPECIAL DRAWING RIGHTS DEPARTMENT

Director *Alternate*	Casting Votes of	Votes by Country	Total Votes[1]	Percent of Fund Total[2]
ELECTED (Continued)				
Alexandre Kafka (Brazil)	Brazil	21,958		
Juan Carlos Jaramillo	Colombia	5,863		
(Colombia)	Dominican Republic	1,838		
	Ecuador	2,442		
	Guyana	922		
	Haiti	691		
	Panama	1,746		
	Suriname	926		
	Trinidad and Tobago	2,718	39,104	2.62
K. P. Geethakrishnan (India)	Bangladesh	4,175		
L. Eustace N. Fernando	Bhutan	295		
(Sri Lanka)	India	30,805		
	Sri Lanka	3,286	38,561	2.59
L. J. Mwananshiku (Zambia)	Angola	2,323		
Barnabas S. Dlamini	Botswana	616		
(Swaziland)	Burundi	822		
	Ethiopia	1,233		
	The Gambia	479		
	Kenya	2,244		
	Lesotho	489		
	Liberia	963		
	Malawi	759		
	Mozambique	1,090		
	Namibia	1,246		
	Nigeria	13,066		
	Sierra Leone	829		
	Swaziland	615		
	Tanzania	1,719		
	Uganda	1,589		
	Zambia	2,953		
	Zimbabwe	2,863	35,898	2.41
ZHANG Ming (China)	China	34,102	34,102	2.29
WEI Benhua (China)				
A. Guillermo Zoccali (Argentina)	Argentina	15,621		
Alberto F. Jiménez	Bolivia	1,512		
de Lucio (Peru)	Chile	6,467		
	Paraguay	971		
	Peru	4,911		
	Uruguay	2,503	31,985	2.15

EXECUTIVE DIRECTORS AND VOTING POWER
GENERAL DEPARTMENT AND SPECIAL DRAWING RIGHTS DEPARTMENT

Director *Alternate*	Casting Votes of	Votes by Country	Total Votes[1]	Percent of Fund Total[2]
ELECTED (Continued)				
Corentino V. Santos	Benin	703		
(Cape Verde)	Burkina Faso	692		
Yves-Marie T. Koissy	Cameroon	1,601		
(Cote d'Ivoire)	Cape Verde	320		
	Central African Republic	662		
	Chad	663		
	Comoros	315		
	Congo	829		
	Côte d'Ivoire	2,632		
	Djibouti	365		
	Equatorial Guinea	493		
	Gabon	1,353		
	Guinea	1,037		
	Guinea-Bissau	355		
	Madagascar	1,154		
	Mali	939		
	Mauritania	725		
	Mauritius	983		
	Niger	733		
	Rwanda	845		
	Sao Tome and Principe	305		
	Senegal	1,439		
	Togo	793		
	Zaïre	3,160	23,096	1.55
			1,468,952[3,4]	98.55[5]

[1] Voting power varies on certain matters pertaining to the General Department with use of the Fund's resources in that Department.
[2] Percentages of total votes (1,490,550) in the General Department and the Special Drawing Rights Department.
[3] This total does not include the votes of Cambodia, Croatia, the former Yugoslav Republic of Macedonia, the Federated States of Micronesia, Slovenia, Somalia, South Africa, and Tajikistan which did not participate in the 1992 Regular Election of Executive Directors. The combined votes of those members total 21,598 — 1.45 percent of those in the General Department and Special Drawing Rights Department.
[4] This total does not include the votes of Sudan which were suspended effective August 9, 1993 pursuant to Article XXVI, Section 2(*b*) of the Articles of Agreement.
[5] This figure may differ from the sum of the percentages shown for individual Directors because of rounding.

Table 1

U. S. External Accounts, 1961-1995
(Dollars in Billions)

Year	GNP	Imports1	Exports1	Trade Balance	Current Account Balance
1961	520.1	14.5	20.9	4.5	5.6
1962	560.3	16.2	20.6	4.4	5.1
1963	590.5	17.0	22.0	5.0	5.9
1964	632.4	18.6	25.3	6.7	8.6
1965	684.9	21.5	26.4	4.9	4.3
1966	749.9	25.5	29.4	3.9	2.4
1967	793.9	26.8	30.7	3.9	2.1
1968	865.0	33.0	33.6	0.6	-0.4
1969	930.3	35.8	36.4	0.6	-1.6
1970	977.1	39.8	42.0	2.2	-0.3
1971	1,054.9	45.5	42.8	-2.7	-3.8
1972	1,158.0	55.8	48.8	-7.0	-9.8
1973	1,294.9	69.8	70.3	0.5	0.5
1974	1,397.4	102.9	97.1	-5.8	-4.0
1975	1,528.8	86.5	89.7	3.1	18.3
1976	1,700.1	108.3	96.0	-12.3	4.4
1977	1,887.2	131.3	101.0	-30.3	-14.1
1978	2,156.1	152.6	119.7	-32.9	-14.3
1979	2,413.9	182.4	151.4	-31.0	-7.9
1980	2,626.1	257.0	220.6	-36.4	1.1
1981	2,957.8	273.4	233.7	-39.7	6.9
1982	3,069.3	254.9	212.2	-42.7	-5.9
1983	3,304.8	269.9	200.5	-69.4	-40.1
1984	3,772.2	341.2	217.9	- 123.3	-99.0
1985	4,010.3	361.6	213.1	-148.5	-122.3
1986	4,235.0	383.0	226.8	-156.2	-145.3
1987	4,515.6	424.1	252.9	-171.2	-162.3
1988	4,873.7	450.5	322.4	-137.1	-128.9
1989	5,200.8	492.9	364.0	-128.9	-110.0
1990	5,465.1	520.8	394.1	-126.7	-95.3
1991	5,677.5	508.9	422.2	-86.7	-8.3
1992	6,194.4	554.0	448.2	-105.8	-66.4
1993	6,293.7	592.4	456.6	-135.8	-106.0
1994	6,500.0(e)	626.0(e)	474.0(e)	-152.0(e)	-134.0(e)
1995	6,695.0(e)	671.0(e)	507.0(e)	-163.0(e)	-147.0(e)

1/ Exports and imports only reflect merchandise transactions; services are not included. Imports, C.I.F. value base; exports F.A.S. value base. Current account balance reflects the result of services, investment, remittance and other unilateral transfers, as well as merchandise imports and exports. However, the years 1961-64 only show the result of merchandise imports and exports, services and income from investment.

Sources: U.S. Council of Economic Advisors, Economic Indicators. The data for the years 1961-1964 are found in the August 1965 issue; the years 1965-1968 are found in the August 1971 issue; the years 1969-1974 are found in the May 1975 issue; the years 1975-1979 are found in the January 1981 issue; the years 1980-1984 are found in the Nov. 1985 issue; the years 1985 to 1992 are found in the Sept., 1992 issue. Some 1992 figures are estimates based on the first seven months of 1992. Economic Report of the President, February, 1994; and Int'l Trade Reporter, 1/19/94, at 117, for 1993-95 data.

Table 2

U.S. Regional Trade Balances
(billions of dollars)

	IMPORTS						EXPORTS					
	1980	1987	1990	1991	1992	1993(e)	1980	1987	1990	1991	1992	1993(e)
Canada	43 1	73 6	93 1	93 0	100 9	112 5	41 6	62 0	83 4	85 9	91 1	67 6
W Europe	46 5	96 1	109 1	101 9	111 3	118 0	67 6	68 6	111 4	116 8	114 5	109 2
Germany	11 8	26 9	28 0	26 0	28 7	28 0	11 5	11 5	18 3	20 8	20 3	18 0
East Asia	48 2	142 3	156 1	160 6	174 1	187 7	35 8	49 8	84 5	89 2	9J 6	94 3
Japan	31 3	84 6	90 4	92 3	97 4	105 2	20 8	27 6	47 8	47 2	46 9	47 2
China	1 1	6 3	15 2	19 0	25 7	30 9	3 8	3 5	4 8	6 3	7 4	8 4
Taiwan	6 9	24 6	22 6	23 0	24 6	25 0	4 1	7 1	11 1	12 7	14 5	14 9
S Korea	4 2	17 0	18 4	17 0	16 6	17 2	4 4	7 6	14 0	14 9	13 8	13 9
Latin America	37 6	47 3	64 4	63 0	69 2	74 4	38 8	34 9	54 3	63 3	75 4	77 2
Mexico	12 6	20 3	30 5	31 5	35 6	39 7	15 2	14 6	28 1	33 1	40 5	41 1
Africa	33 3	12 0	15.9	14 3	14 8	16 2	6 5	5 6	8 0	8 7	9 1	8 5
Australia	2 5	3 0	4 4	4 1	3 7	3 3	1 6	5 3	8 3	8 3	8 7	8 0
E Europe	1 4	1 9	2 3	1 8	2 0	3 2	4 1	2 3	4 3	4 8	5 6	5 7
OPEC	58 8	24 4	38 2	33 4	33 7	35 0	17 4	10 7	13 4	18 5	20 7	18 7
All Countries	249 8	409 8	498.3	490 7	563.3	582 0	224 3	250 2	389 3	416 9	440 1	448 7

Source Dept of Commerce, Survey of Current Business, June 1993, December 1993
1993(e) numbers are estimated from results of the first three quarters of 1993.
East Asia Japan, China, Taiwan, S Korea, Hong Kong
OPEC Venezuela, Ecuador, Iran, Iraq, Kuwait, Saudi Arabia, Qatar, United Arab Emirates, Indonesia, Algeria, Libya, Nigeria and Gabon (from Jan 1, 1993, excludes Ecuador)

It's interesting from this perspective to review U.S. economic history.[1] From 1789 to 1819, although a sound federal government with balanced budgets and restored credit-worthiness had been established, the early American republic had mixed fortunes in the trade area. The long British-French conflict and wars between 1792-1815 brought uneven trading opportunities for the Americans, with serious intermittent disruptions. U.S. trade deficits followed briefly between 1815-19, and in the big foreign investment boom of 1831-37. But otherwise overall U.S. trade balance (despite substantial capital imports) prevailed from the 1820's until the Civil War, a strong period of sustained U.S. economic growth and expansion. Some trade deficits occurred briefly again in 1861, 1864, 1867, 1869, and 1872-73. But otherwise, the U.S. generally enjoyed respectable trade surpluses from the 1870's all the way into the 1930's, another long period of sustained U.S. growth and economic expansion. Trade deficits came briefly again in the depression years, 1933-40. But trade surpluses resumed for the U.S. between 1941-67, through World War II and the postwar economic boom. Reasonable trade balance followed between 1968-75. But U.S. trade deficits gradually began to accumulate between 1976-82, and became very large during the

1. For convenient data see The Statistical History of the U.S. from Colonial Times to the Present (Historical Statistics of the U.S., Colonial Times to 1970, prepared by the U.S. Bureau of the Census), with Introduction and User's Guide by Ben J. Wattenberg, Basic, N.Y., 1976, and Series U 187-200 (Value of Imports and Exports: 1790 to 1970). For more recent data see Table 1 supra (1961-93).

last decade 1983-93. U.S. trade deficits totaled $-1,300 billion since the early 1980's, with $-1,000 billion of current account deficits accumulated in the last 10 years between 1983-93. Meanwhile, the U.S. lost its large net creditor position in 1982 (enjoyed since before World War I), and soon became the World's biggest debtor nation (with $-750 billion in net external debt according to reasonable estimates by 1993).[2] This is a troubling recent performance for the U.S. economy to any sensible observer.

Meanwhile, it's helpful to contrast U.S. commercial and tariff policies with this overall record of U.S. trade and balance of payments (mostly involving healthy trade balance

---

2. A "rough" estimate of the shifting capital position for the U.S. can be suggested from accumulated current account deficits. Thus, because the net creditor position of the U.S. was estimated by in 1980 to be around +$140 billion (1981) and the accumulated current account deficits between 1981-93 totaled at least - $1,000 billion as of end 1993, the U.S. stands roughly $850 billion in debt as of end - 1993. *See the International Investment Position of the U.S.* SURV. OF CURRENT BUS. (U.S. Dept. of Commerce, 1986-93). Heavy net inflows of capital were needed to offset heavy current account deficits. Between the years 1981-1988, the U.S. net position went from +$141 billion to -$532 billion (a swing of $-671 billion in a period with -$798 billion current account deficits). If the same valuation estimates were extended (based on largely historical cots), the net U.S. debtor position would have reached at least -$800 billion by the end of 1993. But, since June 1990, a different valuation procedure has been utilized by the SURVEY OF CURRENT BUSINESS (based more upon contrasting stock market indexes). This new procedure yields a creditor position for the U.S. of +$374 billion in 1981 versus -$521 billion in 1992. Surv. of Curr. Bus. (June 1993). Either way the U.S. net international investment position has suffered a major deterioration between 1981-1992, anywhere from -$900 billion to -$950 billion, depending upon the valuation procedure.

or surpluses until recent years.)[3] From the beginning of Alexander Hamilton's sound financial policies in 1791, and through most of subsequent U.S. economic history, we employed substantial tariffs on imports. It was not until the post-World War II era that the U.S. began to lower its tariffs substantially, and especially after the late 1960's. During the first 25-30 years after the War, the U.S. enjoyed special advantages in competitiveness and productivity over most economic rivals. U.S. trade surpluses occurred through 1967, and reasonable balance continued into the mid-1970's.

---

3. For general histories on tariffs see John M. Dobson, Two Centuries of Tariffs: The Background and Emergence of the U.S. International Tariff, Commission, U.S. int'l Trade Commission, 1976; F. W. Taussig, The Tariff History of the U.S., 8th Ed. (1931); Harold Underwood Faulkner, American Economic History (Rev. Ed. 1931), esp. 224-239.

For specific tabulations of imports compared to customs duties, 1821-1970, see Series U207-212, Statistical History of the U.S., cited note 33 supra. For the years 1791-1820, compare the tabulation of import values in Series 193 (ibid), and an estimate of customs receipts from Timothy Pitkin, A Statistical View of the Commerce of the United States of America, New Haven: Durrie & Peck, 1835. We can summarize customs charged as a percentage of all imports (free and dutiable) as follows: 1791-1815, averaging roughly 10 percent; 1816-20, 20-25 percent; 1820-32, roughly 40 percent; 1833-43, 17-20 percent, 1844-56, 20-25 percent; 1857-61, 15-17 percent; 1862-72, 35-40 percent; 1873-90, 30 percent; 1891-98, 20 percent; 1899-04, 27 percent; 1905-12, 20-23 percent; 1913-20, 17 down to 6 percent; 1921-30, 13-14 percent; 1931-39, 15-17 percent; 1940-45, 10-12 percent; and 1947-70, only 6-7 percent. Thus, except for the brief Wilson era (esp. 1916-20), and the post World War II era, the U.S. generally charged tariff duties on imports averaging 10 percent, and often substantially more in the more protective periods. (With respect to the tariffs charged on dutiable imports, i.e., non-free items, the percentages imposed were considerably higher, and more seriously protective. See Series 212, Statistical History of the U.S., ibid.)

But from the late 1970's, and even more since the early 1980's, U.S. external trade performance (imports and exports) was squeezed between two forces--(i) increasing and asymmetrical U.S. trade open-ness (with minimal response to foreign industrial policies, subsidies, restrictions, or discounting), and (ii) increasingly powerful industrial challenges from Japan and many NIC's (Taiwan, Korea, and others). Many of these rivals used aggressive industrial development policies, export subsidy measures, significant import restrictions (formal and informal), and widespread discounting into U.S. markets.[4] In retrospect, we should not be surprised at these results -- large increases in U.S. imports, with serious difficulties in expanding U.S. exports. And most unfortunately, during the early 1980's the U.S. began to run very large peacetime budget deficits, financed by heavy domestic and foreign borrowing. Interest rates were kept up in the U.S., which inhibited productive investments in U.S. industries. This helped allow foreign industries to grow faster than U.S. manufacturing. U.S. companies lost further ground in production, new plant and equipment, with weakened international competitiveness. But the underlying problem is that the U.S. was neglecting its underlying production-technology base, in contrast to a growing list of expanding industrial rivals (Japan, Taiwan, Korea, Brazil, and other NIC's), and that the EC as a whole was doing a better job of maintaining their industries, and avoiding excessive trade and current account deficits.[5]

---

4. For more recent U.S. trade history, increasing asymmetrical openness, and the problems of competing industrial policies, see the extensive sources cited note 33 supra.

5. Ibid.

APPENDIX

IMPLICATIONS OF GATT 1994 AGREEMENT

Topics	U.S Concessions or Gains	Impact on U.S.
Antidumping	• Partial weakening of U.S. antidumping remedies • More use of GATT panels and less national relief	• Opens U.S. to further discounting, dumping, and competition by subsidized foreign industries • Even more free importation
Countervailing Duties for Subsidies	• Weakens U.S. remedies for foreign subsidies • Negligible limitations for subsidies abroad • More use of GATT panels and less national relief	• Further weakening of U.S. countervailing remedies against foreign subsidies and industrial policies • Even more free importation
Safeguards	• Partial restrictions on safeguard relief • More use of GATT panels and less national relief • Liberal exemptions for most developing countries	• Somewhat further weakening of U.S. safeguard relief where serious injury may be threatened from increased imports • Strong safeguard relief for most developing countries

Rules of Origin	• GATT surveillance begins on Rules of Origin	• NAFTA Rules of Origin benefiting U.S. manufactures may be challenged and weakened
Agriculture	• Limited reductions of domestic and export subsidies in many countries	• Modest increase for some U.S. exports, with some increase in U.S. imports
Services	• U.S. seeks broader access for banking, insurance, travel, and many other services • Limited gains in some markets, but MFN treatment opens U.S. markets more than others	• Substantial resistance by many LDC's and NIC's, with limited access and opening
Dispute Settlement	• More use of GATT panels and mediation • Less scope for national relief against unfair trade practices or other restrictions	• Efforts to promote stronger mediation • Weaker and less reliable relief against unfair trade and other restrictive practices
GATT Articles and Tokyo Round Codes	• No major changes in present GATT and code structures • But favorable treatment of least developed countries is strengthened	• No significant alteration of GATT provisions, or any changes in asymmetries

FOGS - Functioning of the GATT System	• Strengthens GATT secretariat and its initiative • Reduces scope for national challenges	• No great change except to further strengthen GATT momentum • Weakens national counter measures for asymmetrical trade
MTO - Multilateral Trade Organization*	• New MTO succeeds GATT (for acceding parties) • Substantial role in managing rounds, and managing the dispute settlement system* • Ministerial conferences every two years	• Supranational secretariat and continuing councils, settlement body, and conferences every two years* • Substantially weakens national trade regulation • Entrenches GATT asymmetries - changes becomes very difficult

* For most Council decisions voting by majority (or by requiring no more than two-third of the votes) will replace consensus or effective unanimity. Unanimous Council decisions (inverted consensus) will be required to over-rule GATT panel and appellate decisions.

General Implications of the GATT 1994 Agreement -

- Makes U.S. more securely open to MNC's
- No substantial increase in U.S. exports, nor any substantial increase in access for U.S. merchandise or services
- Consistent with unilateral free trade outlook and interests of many MNC's
- Disadvantage for many U.S. domestic manufacturers - weakens U.S. safeguards, antidumping, and countervailing duties relief for subsidies or other unfair trade practices

Mr. MATSUI. Mr. Choate.

STATEMENT OF PAT CHOATE, DIRECTOR, MANUFACTURING POLICY PROJECT, WASHINGTON, D.C.

Mr. CHOATE. Thank you very much, Mr. Chairman.

I think it is important to divide the trade agreement and the issues surrounding it into two parts. One part is the substance of the trade agreements that have been brought to the Congress. The second part is the institution that will administer those trade agreements.

Fortunately, as to the latter issue, the World Trade Agreement, it has a very brief charter. It is 14 pages. It is written in very clear and explicit language. By adopting the World Trade Organization, the United States agrees explicitly to abide by its rules and decisions.

Second, we agree to conform our laws to the obligations of the WTO. The agreement itself is very clear in article 16, and;

> Each member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed agreements.

Third, the agreement is also very clear in article 16 in which it says, "No reservations may be made in respect to any provisions of this agreement"—no reservations.

Fourth, the agreement says very clearly in article 9,

> A ministerial conference and general counsel of the WTO shall have the exclusive authority to adopt interpretations of this agreement and of the multilateral trade agreements.

Fifth, the charter says, very clearly in article 9,

> Decisions shall be taken by a majority of the votes cast unless otherwise provided in this agreement.

And, finally, as Mr. Lang presented in his testimony, the United States has no veto in this arrangement.

These are very powerful provisions. What they suggest and what they mean very clearly is, Congress cannot fix this agreement. Whatever amendments that the Congress may put into implementing legislation will have to be considered by the WTO as to whether or not they will have effect. If the WTO does not accept those amendments, which means our other 116 trading partners do not accept those amendments, then we are obligating ourselves to subject those amendments to a test in the WTO as a trade-impairing tactic of the United States. As the colloquy between Mr. Levin and Mr. Gingrich indicated, the United States will pay in perpetuity until we change those laws to meet our obligations under this agreement.

It seems to me that what we are doing is creating the most powerful international institution in the world. It seems to me also very important, therefore, for us to see what is the likely outcome of this operation.

First, the United States will cede enormous power to other nations. The GATT today works to U.S. strengths. The GATT gives the United States power for two basic reasons. We can veto any decision that we like; and we have roughly 20 percent of global commerce. Thus, our market is rich enough that we can take unilateral

actions with other nations to, in effect, assure to get what we wish. That power will disappear under the WTO.

Under the GATT, we have a process that encourages negotiations and compromise. The WTO creates a legalistic rule-driven system that will encourage conflict and trade wars with other nations.

The other thing that is important about the WTO, and significant, is this: Because it will be a political body run by votes; it will be an organization where others will attempt to gain influence by logrolling and influencing those votes.

We can see in the United Nations how this is going to go in the WTO. Of the WTO members who are U.N. members, roughly 70 percent of them vote against the United States half of the time at the United Nations. And these are on political matters. When one is dealing with economic matters, I would doubt that it would be anything less; in fact, I would think that it would be greater.

The other point is this: 55 of these countries that will be members of the WTO do less than $10 billion a year in trade. Their interests are therefore not the same as our interests.

And, finally, 80-plus percent of the votes of the WTO will be by developing nations. Karel Van Wolferen, the Japan expert, makes the very clear and compelling argument that other nations such as Japan will have a moral obligation to manipulate the WTO rules to hijack the organization and use it to their advantage. And given the WTO rules and given the WTO structure, that will be easy to do. It will be simply a matter of pulling in a significant number of votes. And since we agreed to abide by the rules—and I presume that we will honor our commitments—there will be virtually nothing that we can do unless we can go out and politic to get a majority of votes in the WTO.

It seems to me, as we take a look at the past half century, that the GATT, which is an organization in which we have an enormous influence, has worked marvelously well. It has propelled the largest expansion of trade in the history of the world. And it did so without an international bureaucracy having the kinds of hammers and levers that the WTO will have.

I appreciate the opportunity for offering a comment and look forward to an exchange of views.

Mr. MATSUI. Thank you, Mr. Choate.

[The prepared statement follows:]

Testimony
of
Pat Choate
Director, The Manufacturing Policy Project

Before
Committee on Ways and Means
U.S. House of Representatives
Washington, D.C.
June 10, 1994

Mr. Chairman and Members of the Committee:

I appreciate this opportunity to share with you my concerns about the proposed new World Trade Organization.

The Key Issue

The Uruguay Round of Multilateral Trade Negotiations broadly expands the rules of global trade. It also establishes a powerful new institution -- the World Trade Organization (WTO). It would be empowered to administer, amend, and enforce the global rules of trade.

The WTO would radically alter the way the United States interacts with other nations. It would sharply weaken this nation's power relationship with other countries. It will create trade conflicts.

The United States Has Strong Influence In GATT

During the mid-1940s, a high-level U.S.-British team devised a Post War economy system that was to rest on three pillars -- the World Bank, the International Monetary Fund, and the International Trade Organization (ITO). The ITO was to administer the General Agreement on Tariffs and Trade (GATT). But the U.S. Congress rejected the ITO as a threat to U.S. sovereignty. And they did so despite grave warnings from academics, editorial writers, and much of the Washington establishment that our failure to join would retard the post-War recovery. What the Congress realized was that America and other global powers did not need a new international bureaucracy to lower trade barriers and start a process of global growth and trade expansion that continues to this very day.

Now we are here almost a half century later re-fighting virtually the same arguments that surrounded the ITO. Back in the 1940s, for instance, the *New York Times* editorialized, "the ITO represents the capstone of the post-War trade policy we have been seeking to build." Recently, the *Washington Post* editorialized, "the WTO is being set up to meet a great need." Again, the talk is that lower trade barriers and global growth cannot occur without a United Nations of trade. This is no more correct today than it was in the late 1940s.

When Congress rejected the ITO, GATT was left as a multilateral agreement, but not as an international organization. In this void, the GATT evolved into a contractual relationship between trading nations. As such, it serves as a forum for negotiating the rules of trade and solving trade disputes.

The GATT has worked well over the past four decades. It has been open to change -- since 1947 there have been seven rounds of GATT negotiations. And under GATT, global trade has grown more than in any time in history.

While the GATT permits votes, it tends to act by consensus, largely because if there is a dispute, all nations -- including the parties to a dispute -- must agree before any penalties can be imposed. The effect of such procedures is to give each contracting party a veto and drive disputes towards negotiation and compromise, rather than litigation and conflict.

Thus, each member nation, large and small, can protect their interests. Ultimately, each nation also retains the authority to act unilaterally under GATT when all else fails.

As a consequence, GATT is based on power relationships between nations. Those relationships are derived from each nation's relative strength in the world. Naturally, the major economic powers have more influence, since they

have more at stake in the global trading system. After all, the United States, Japan and European Community do more than half of all world trade.

The United States has great influence in GATT for two principal reasons. The first is that the U.S. has a veto in GATT. Simply put, the U.S. can veto any GATT decision that is to its disadvantage. This is an enormous advantage. All nations know it and negotiate accordingly.

Second, the United States has the largest market in the world. The United States can use access to this vast market as a lever, even as a club, to influence the trade actions of others. While unilateral U.S. action is more the exception than the rule, the fact that it can be done gives U.S. negotiators most of their leverage.

Naturally, other nations wish to reduce the U.S. influence in the global trading system. Under the WTO, the United States will lose its veto. It also agrees to not act unilaterally.

The United States Will Lose Influence in the WTO

The 14-page charter for the World Trade Organization is remarkably clear. It creates an international organization equal in stature to the World Bank and IMF.

Unlike the GATT, however, where influence comes from power relations and negotiations between Members, the WTO will operate under a set of formal rules. Influence will go to those who are best able to manipulate those rules to their advantage. Doing so will be easy.

Why? Because WTO decisions will be made by voting and each nation will have only one vote and no veto. Some 18 WTO members, such as Antigua, have populations less than 1 million people. Each of their votes carries as much weight as that of the United States. Instead of being first among equals as in GATT, the United States will only be one among many at the WTO.

Developing nations will dominate WTO voting for they will hold more than 80 percent of the WTO votes. These countries' votes at the United Nations on political matters provides a clue how they will vote at the WTO on economic issues. More than three-quarters of the WTO members, all developing nations, voted against the United States on half or more of the UN votes in 1993.

Inevitably, the WTO will be a highly politicized organization, where votes can be bought or influenced. Fifty-five of the Member nations that vote against the United States 70 percent or more at the United Nations do less than $10 billion of trade annually. To them, the rules of trade are relatively unimportant. For those few which have democratic institutions, their interests are primarily development. For those many which are totalitarian and undemocratic, their interests are primarily political and personal. Thus, their votes can be influenced through foreign aid, investment decisions of private investors, and that staple of third-world politics -- political corruption.

Indeed, well over a third of the WTO Members are not democracies. Equally significant, the votes of the 22 nations that the WTO charter explicitly exempts from WTO trade rules will be up for grabs.

Some nations, such as Cuba, are vigorous opponents of the United States and can be expected to almost always vote against whatever position the United States takes. Cuba, for instance, votes against the United States 92 percent of the time at the UN. Put another way, Fidel Castro will almost certainly neutralize the U.S. vote at the WTO from day one.

The WTO will be operated by a Director-General appointed by the Members. Inevitably again, this person will be beholden to the developing nations since they have the overwhelming majority of votes. Yet, the interests of the developing world and that of the advanced industrial nations are often dissimilar. An internal conflict is thus built into the WTO from the beginning.

Karel Van Wolferen, a well known scholar on Japan, points out, the leaders and bureaucrats of other nations -- particularly those of Japan and the European Community -- have a moral obligation to hijack this new organization and turn it to their own advantage. The WTO voting structure makes such hijacking easy to do. The only way to for the United States to prevent this will be to enter into a bidding war for the votes of small and developing countries.

The WTO Will Have Power Over U.S. Decisions

Unlike GATT, the WTO will have important new powers to enforce its decisions, notably those on trade disputes. The WTO is authorized to establish dispute panels composed of international experts, to monitor the implementation of its rulings and to authorize suspension of concessions and other obligations under the covered agreements of those nations who fail to abide by its decisions.

These panels will have a "Star Chamber" quality in that their deliberations shall be secret. The opinions and votes of individual panelists shall also be secret. All documents used in the proceedings shall be secret. All decisions are final. The only appeal is to WTO's Appellate Body and its decisions are final, unless rejected by all Members of the WTO, including the plaintiff nation.

By joining the WTO, the United States also agrees to abide by all of its rules and decisions and ensure the conformity of all its laws, regulations and administrative procedures with its WTO obligations.

Already other nations are identifying federal, state and local U.S. laws that supposedly are illegal trade barriers. Under the WTO, this nation will be the defendant in hundreds, if not thousands, of trade disputes in which U.S. laws will be challenged. Whenever the U.S. loses, the only choices are to either change the laws, not enforce them, or pay WTO's penalties.

The United States Will Have Little Power to Change the WTO

The charter of the WTO makes it difficult for any Member to alter the basic structure, rights and obligations of the institution. It provides, for instance, that any such changes cannot be made until they are accepted and approved by a vote of two-thirds of the Members. This is difficult in any body, particularly one such as this with so many divergent interests. Once in the WTO, therefore, it will be difficult for the United States to change any of its worst features, such as its secret, "Star Chamber" quality dispute procedures.

Equally significant, the charter of the WTO provides that its governing board "shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements." A three-quarters majority is required to adopt an interpretation. This is virtually impossible to do in any political body.

Most important, by joining the WTO, the United States agrees that, "No reservations may be made in respect to any provisions of this Agreement." Thus, Congress cannot "fix" this Agreement. If it is accepted, it is accepted as it is, regardless of what the implementing legislation or legal revisionists may say.

The WTO Matters

If the WTO is created, it will instantaneously become one of the world's most important and most powerful international bodies. While the argument is often made that if the United States finds it unacceptable it can always withdraw with 6 months notice, this is meaningless, and the world knows it. As the world's largest economic power, we have the greatest interest in maintaining the stability of the international system. Conversely, we have the greatest interest in avoiding confrontation, which is what a rules-based system will produce. So as we do in many political and economic disputes today, we will accept decisions against U.S. at the WTO so long as they do not threaten the overall stability of the international trade system.

The argument is also made that the United States can ignore the decisions of the WTO. Yet, a basic goal of the WTO is to exact so high a price for ignoring those decisions that compliance is automatic.

To raise the threshold of pain, the WTO is empowered to authorize cross retaliation. If, for example, the United States were to take unilateral action against one nation, the WTO could authorize its government to raise tariffs on <u>any</u> U.S. imports to offset the loss. Inevitably, other nations would cross retaliate on the most competitive U.S. exports, such as telecommunications, semiconductors, agriculture, automobiles and financial services. Because of this provision, any U.S. sector can be drawn into any U.S. trade dispute -- unless, of course, this country strictly follows WTO dictates.

In short, the United States is likely to comply with WTO decisions. Our government, moreover, has repeatedly pledged to other nations that we will honor WTO dispute panel decisions.

Conclusion

Mr. Chairman and Members of the Committee, the World Trade Organization's system of voting and power sharing is a radical break with the long-standing bipartisan view that America should not subsume its governing authority to international organizations. It represents political and economic redistribution on a scale unprecedented in human history.

The structure of the UN Security Council, our opposition to the Law of the Sea Treaty, and to environmental multilateralism at the recent Rio Conference, and, indeed, the very structure of GATT before the Uruguay Round, all flowed from America's traditional bipartisan rejection of global government.

Although few in our country have focused fully on what the future holds under the WTO, Peter Sutherland, Director-General of the GATT, has charted clearly one view. He has said, "The least developed countries are winners." Above all, he said, least developed countries would gain from strong multilateral rules and dispute settlement. For small and economically weaker countries these rules are the only protection from the "law of the jungle" -- Sutherland's term for global competition.

Mr. MATSUI. Mr. Fein.

STATEMENT OF BRUCE FEIN, ESQ., GREAT FALLS, VA.

Mr. FEIN. Thank you, Mr. Chairman. I am grateful for the opportunity to voice constitutional sovereignty and fairness concerns regarding trade novelties in the World Trade Organization.

The WTO promises to live indefinitely, and thus, its structural elements should be scrupulously examined to avoid any probable and persistent bias in its application against the interests of the United States. I would like to briefly summarize what I view as the major sovereignty issue that is raised by the charter, that I think has been examined with too much economy with the truth.

The dispute settlement panels will be international civil servants, selected by a Director General. That General also will be selected by a majority vote of the signatories, 80 percent of whom are Third World or less-developed countries. In other words, a Secretariat who makes the decisions as to who will sit on these panels will probably not be a representative of the United States' interests.

I think similar comments are applicable to the appellate body that will review panel decisions at the behest of any initial loser. There are some modest modifications, but in substance, we have international civil servants who will purport to be acting independently of their home governments in ruling on whether or not U.S. laws conform to the WTO, and also in reviewing decisions of U.S. agencies and tribunals relating to antidumping, countervailing duty, customs evaluations cases.

In other words, Mr. Chairman, these panels in some instances, will be sitting as surrogate Federal courts of the United States. And they will be exercising the same kind of power as those Federal courts in determining whether or not the factual findings of lower decisionmaking bodies in the United States are accurate and whether a law has been applied properly.

Now, ordinarily, those who are entrusted with enforcing, interpreting U.S. law with any kind of binding effect must be appointed under article II of the Constitution, either by the President or the head of a department or some other agency of the executive or judicial branch that is identified by Congress. Under the WTO, however, those entrusted with authoritative interpretations of U.S. law will be appointed not by any U.S. official identified in article II; they will be appointed by either the Secretary General or the entire dispute settlement board, if it is an appellate body that is reviewing U.S. laws or decisions of U.S. agencies.

Now, I think it is very difficult on the basis of *Buckley* v. *Valeo*, a 1976 Supreme Court decision, to square the WTO rules with the U.S. Constitution. You may recall in that case, Mr. Chairman, that the Congress wanted to appoint members to the Federal Election Commission to bring lawsuits and enforce the Federal Election Campaign Act.

The U.S. Supreme Court nixed that approach, said, no, Congress is not identified in article II as empowered to appoint those who would interpret and enforce U.S. laws. Therefore, the structure had to be changed so that the President appointed members of the Federal Election Commission, which obtains today.

Now, the dispute settlement panels and the appellate body will be enforcing U.S. law. The WTO Charter has no legal effect unless Congress votes to make it part of U.S. law. And to argue that it is not an enforcement of the law simply because it has international ramifications seems to me wholly weak and not at all responsive to why the article II provision was selected in the Constitution, was maintained in the Constitution. It is to ensure some accountability to a U.S. official for those empowered with the very delicate and important task of interpreting laws of the United States.

Now, I think a similar analogy can be drawn with regard to WTO review of U.S. laws for conformity with WTO obligations. And I think most of the conflict will arise on that score with regard to environmental, safety, health laws, which under the WTO Charter must be the least trade restrictive, consistent with the nontrade objectives of the law. It has been noted earlier this morning, for instance, that the CAFE standards, namely the one that requires the minimum miles per gallon achieved in any manufacturer's auto fleet, may be vulnerable to attack under the WTO and is under attack under the GATT because it can be argued it is not the least trade restrictive to achieve pollution goals, namely, an alternative, lesser restrictive method would be to impose an emission tax on the exhaust, or perhaps permit driving only 3, 4 days a week.

All those kinds of decisions will be subject—will be made under the WTO by majority vote, by the DSB. Excuse me, it will be made through the panel mechanisms and the appellate body.

I think an analogy can be drawn if the following was part of the WTO Charter: Suppose the charter authorized the Director General to appoint a body called a "supercongress," and the supercongress was to be composed of international civil servants, and if that supercongress voted that a law of the United States violated the substantive provisions of the WTO, the law would be repealed, unless the U.S. Congress wished to vote $500 million in compensation for that particular refusal to accept the repeal of the law.

I think that is a clear indication of the importance of these dispute settlement bodies under the WTO Charter, and the fact that their authority ought to be, under the Constitution, entrusted only to those appointed pursuant to the article II appointments clause.

Let me come to the crux of the sovereignty issue. Some have insisted, including Judge Bork and Ambassador Kantor and a host of other celebrities, that panel decisions regarding dumping, countervailing duties, customs valuation, laws of the United States, are mere scarecrows with no authentic legal force. And that conclusion, I think, by consensus, pivots on the observation which is accurate that the United States may ignore any WTO obligation.

In other words, they insist, everything decided under the WTO is advisory, and thus neither represents enforcement of the U.S. law, nor otherwise subtracts from U.S. sovereignty. But it seems to me that argument is sheer sophistry, more to be marveled at than imitated. As Justice Oliver Wendell Holmes taught, "If you want to know the law and nothing else, you must look at it as a bad man who cares only for the material consequences which such knowledge enables him to predict."

The WTO would create obligations that would impair U.S. sovereignty because disobedience to WTO rulings triggers a right to impose economic sanctions against the United States or oblige it to pay monetary compensation. The power of the WTO panels is akin to the power of the Federal Court, to impose fines on parties for criminal or civil contempt of injunctions or other court orders.

Take, for instance, the famous United Mine Workers case; that stemmed from a strike by the Mine Workers encouraged by then Mine Worker Leader, John L. Lewis, when the United States was in possession of and operating coal mines immediately after World War II. And there was an anti-strike injunction issued by the court, and John Lewis flouted it, as was his wont, and the union did as well.

Now, the result was not a court order that compelled Mr. Lewis to enter the coalfields and mine coal, but he had to pay a sizable fine. The same kind of fine was levied on the union, although it is true that the court did not require the union officers to go into the fields and mine coal.

Now, both Mr. Lewis and the union, which lost their case in the U.S. Supreme Court, surely believed that the court order subjected them to the sovereign power of the United States, even though they retained the power to pay fines or mine coal.

Now, the same, it seems to me, can be analogized by returning to the hypothetical of the supercongress. If we have a situation where Congress is required to choose between accepting a repeal of a Federal law or ponying up $500 million, it seems to me that you all, voting whether to repeal or pony up $500 million in revenues when you are already confronting deficits of $200, $300 billion, would clearly feel that you were not as free to make that decision in exercising your legislative power as you would be if you didn't confront that dilemma between money and retaining your U.S. law.

In sum, sovereignty is emphatically not maintained simply because a nation retains a choice between specific compliance with an international directive or economic detriment. It is, thus, no answer to the sovereignty issue raised by the WTO that the United States would retain the power to choose between economic retaliation and a change in its laws or practices or even the use of section 301 of the Trade Act.

Let me address section 301 briefly, if I may. The Ambassador insisted that 301 would remain unimpaired, but I think that is at least dissembling, if not outright false. Under the WTO, we are required to submit any dispute arising under its terms to the dispute settlement panels. We cannot act unilaterally consistent with the WTO.

Now, it is true because, as in all other cases, you can defy an international obligation if you wish to; we could still use 301, accept the economic sanctions or pay compensation for its use, but it clearly would be illegal to use section 301. Therefore, we would have to contemplate—the administration would have to contemplate if it chose to exercise 301 powers, whether it wanted to pony up what could be a very daunting economic penalty that might come from the U.S. budget, which is not overflowing like the Count of Monte Cristo's bank account.

Now, a few analogous international examples, I think, are further instructive. Libya at present confronts international sanctions, economic sanctions voted by the U.N. Security Council for failure to extradite Libyan nationals suspected of complicity in the bombing of Pan Am flight 103. Now, isn't Libya's sovereignty impaired because of economic coercion imposed for shielding the suspects in a court within Libyan law, even though they still are housed under Colonel Qadhafi's despotism?

Cuba was subject to a naval quarantine during the Cuban missile crisis. Did the quarantine leave Cuban sovereignty unimpaired because it retained the option to choose, in conjunction with the Soviet Union, to continue to house the Soviet missiles?

U.N. Security Council economic sanctions against North Korea seem impending because of the latter's flouting of resolutions concerning nonproliferation of nuclear weapons and nuclear site inspections. Would such sanctions leave North Korea's sovereignty unimpaired because the nation might choose to persist in its defiance? Indeed, North Korea has stated it might view any economic sanctions as the equivalent of an act of war. That is how much they think their sovereignty would be impaired by sanctions.

The outstanding Security Council economic sanctions against Haiti for ousting President Aristide is another example of impairment of national sovereignty, despite the power of Haiti's despots to retain their despotism.

Now, it was Justice Joseph Storey, a very celebrated and storied Supreme Court jurist, who explained that sovereignty is the "power to do everything in a State without accountability," let me repeat, "without any accountability." Domestic decisions and laws of the United States are not unaccountable under the WTO, because a choice to leave them intact if it would defy a WTO panel ruling is made accountable to an international body.

How is the accountability expressed? You pay up in compensation or you accept economic sanctions. That is being accountable. If the maintenance of U.S. sovereignty under international accords means no more than that the Nation is permitted to violate any obligation and accept the international law consequences, then sovereignty is chimerical. It would be unoffended even by a treaty authorizing Congress to declare war only with the consent of Saddam Hussein.

A power to violate is always available to the United States, if we speak in terms of realpolitik, so long as we are willing to fight signatories or accept other forms of coercion imposed because of the violation. Although sovereignty does not lend itself to a definition as exact as Euclidean geometry, any earthbound concept, I submit, would find it impaired if a nation's complete independence in the enactment and administration of its laws is achievable only by paying the equivalent of tribute to the international community.

The second issue I would like to address is the likely——

Mr. MATSUI. Mr. Fein, could you perhaps summarize your conclusion, and—I don't really want to interrupt you or others, but we have another panel after this and I am sure the members will have questions. I do apologize to you, because we haven't enforced any time limits on any of the speakers prior to you or the previous panel, but we do need to move on.

Mr. FEIN. I accept that advice as a concession to the shortness of life that we all are encountering here. I just have a couple of minutes to address what I see is systematic bias in the decision-making, the panelists, and the appellate body. They will be selected I think largely as representatives of Third World, less-developed countries, just on the basis of numbers and who is going to be occupying the seat of the Secretary General. Although we might have panels who can be truly independent of our country, we have a tradition of government basically leaving the economy free and open and with individuals who could sit from the United States as independent panelists.

I submit that simply would be visionary to expect it in most of those from other signatory nations. One cannot imagine a representative of Cuba who wouldn't be a shill of Fidel Castro when sitting on a panel. And the same could be said, I think with lesser force, with regard to so many countries whose panelists will be sitting on these bodies, who basically require some kind of loyalty to the government, whether express or otherwise, if the individual hopes to return to that country and prosper in any particular way.

In other words, Mr. Chairman, I think the panels will be systematically biased against the interests of the United States. They will not share our same view of fair trade and what are sensible trade-offs between fair trade and other equally urgent goals. And although initial decisions may not be adverse to the United States, it seems to me rather reckless to permit the structural decision-making bodies to sit around like a loaded gun, persistently threatening the U.S. interests at any future time.

Now, the trade benefits of the WTO are enticing to many, but its revolutionary innovations in dispute resolution at least justify sober second thoughts. The values vindicated by turning constitutional square corners and insisting on fairness in decisionmaking seem more important than the immediate economic gains prophesied by WTO evangels.

I thank you, Mr. Chairman.

[The prepared statement follows:]

STATEMENT OF BRUCE FEIN

Mr. Chairman and Members of the Committee:

I am grateful for the opportunity to voice constitutional and fairness concerns regarding trade novelties in the World Trade Organization. The WTO promises to live indefinitely, and thus its structural elements should be scrupulously examined to avoid any probable and persistent bias in its application against the interests of the United States.

I.

Constitutionally Dubious Impairment of Sovereignty

The WTO would establish constitutionally questionable ad hoc international panels beholden to its Director General to review, inter alia, antidumping, countervailing duty, and customs valuations decisions issued by tribunals of the importing country and a virtually unlimited number of United States laws that might offend free trade purists.

The panels, for instance, would be empowered to review decisions of the International Trade Administration of the Department of Commerce and the International Trade Commission regarding antidumping disputes. To justify dumping relief, the grievant must demonstrate a discrepancy in the sales price of a product between the country of export and country of import in the ordinary course of business, or, sales below costs that cause or threaten to cause material injury to domestic competitors. The ITA makes initial decisions regarding dumping, and the ITC makes material injury rulings.

Under the WTO, ITA and ITC decrees interpreting United States anti-dumping laws are subject to review by three-member panels selected as follows. The WTO Secretariat would initially propose panelists to the disputants, who cannot be rejected but for "compelling reasons." The Secretariat would maintain a list of government or private trade experts as potential panelists at the recommendation of signatories or otherwise. Panelists are enjoined to act independently of any government instructions or influence. If the dispute is between a less developed and a developed country, the former may insist on at least one LDC panelist. If the disputing parties fail to accept the Secretariat's nominations, then he would select panelists unilaterally.

The Dispute Settlement Panels would apply the anti-dumping law applied and interpreted by the ITA and ITC, and review their anti-dumping decisions for error in the establishment of facts or customary interpretation of public international law similar to that which would obtain if review were had in a federal appellate court. In other words, the panels would be virtual surrogates for federal courts; but they would lack the institutional independence or appointment accountability of Article III judges under the United States Constitution.

Final panel reports are anonymous, and are binding, unless the Dispute Settlement Board by consensus objects, or a party decides to appeal to a standing Appellate Body. Its seven members would be chosen by the DSB for four-year terms, would sit in panels of three, and would be instructed to recuse if there would be any direct or indirect conflict of interest. The Appellate Body would review the issues of law addressed by the initial panel, and express its opinions anonymously. Its decisions are binding, unless rejected by a DSB consensus.

Disobedience to an Appellate Body ruling exposes the violating signatory to economic losses in the form of compensation or trade sanctions.

The constitutionality of the WTO panels under the Appointments Clause of Article II, section 2 seems doubtful. It stipulates that the President shall have power, by and with the advice and consent of the Senate, to appoint:

> "ambassadors, other public ministers and consuls, judges of the supreme court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law. But the Congress may by law vest the appointment of such inferior officers as they think proper, in the president alone, in the courts of law, or in the heads of departments."

Under the WTO, panelists are appointed by the Secretariat or the DSB, not by any United States officeholder identified in Article II.

It might be urged, however, that panelists are not officers of the United States and thus their selection is uncircumscribed by the clause. In Buckley v. Valeo, 424 U.S. 1 (1976), the Supreme Court described appointments clause officers as those "exercising significant authority pursuant to the laws of the United States." It seems difficult to deny that panel members would satisfy that characterization. The WTO charter, if enacted by Congress, would establish the law by which panel members derive their review authority. And those powers are every bit as significant as the federal tribunals who would otherwise review antidumping cases, such as the Court of International Trade or the Supreme Court, whose members must be selected in accord with the appointments clause.

It might also be maintained, nevertheless, that panelists exercise power pursuant to international law, not United States law. Panelists, however, will exercise power only if the WTO charter becomes a law of the Untied States through approval by Congress; and, the panelists would be applying laws of the United States in reviewing decisions of the ITA or the ITC. It seems specious to argue, therefore, that panelists would not be enforcing and acting pursuant to United States law; that observation is not discredited by the fact that they are also acting pursuant to international law.

Suppose Congress enacted a statute empowering the Prime Minister of Britain to appoint a Super Supreme Court to review decisions of the Supreme Court for factual or legal error concerning foreign commerce. Could it be plausibly argued that the Super Supreme Court was not exercising significant authority pursuant to U.S. laws, and thus fell outside the appointments clause?

Some have insisted, however, that panel decisions regarding dumping, countervailing duties, customs valuations, and countless U.S. laws for consistency with WTO norms are mere scarecrows with no authentic legal force. That conclusion pivots on the observation that the United states may ignore any WTO obligation. In other words, everything decided under the WTO is advisory only, and thus neither represents enforcement of U.S. law nor otherwise subtracts from U.S. sovereignty.

But that argument seems sheer sophistry, more to be marvelled at than imitated. As Justice Oliver Wendell Holmes taught: "If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict..."

The WTO would create obligations that would impair U.S. sovereignty because disobedience to WTO panel rulings triggers a right to impose economic sanctions against the nation or oblige it to pay monetary compensation. The power of the WTO panels is akin to the power of a federal court to impose fines on parties for criminal or civil contempt of injunctions or other court orders. For instance, in U.S. v. Mine Workers, 330 U.S. 258 (1947), the Court upheld sizeable fines against UMW leader John L. Lewis and the union for defying an anti-strike injunction. The fines were

surely exercises of sovereign power over Lewis and the union despite the court's failure to coerce them physically to mine coal in accord with its order. Similarly, sovereignty is exerted when a court imposes a civil contempt fine on an individual who refuses to testify pursuant to court order. The fact that the individual possessed a choice between compliance or economic loss does not undermine the sovereignty of the United States over the person.

Suppose the WTO charter empowered the Secretariat to appoint a Super Congress. It would review laws passed by Congress arguably inconsistent with WTO obligations. If it found inconsistency, the offending U.S. law would be automatically repealed. The repeal could be blocked by an affirmative vote of Congress, but if it did so, the United States would be compelled to pay $500 million to a less developed country foreign aid fund. Would not Members of Congress feel their sovereignty in making U.S. law was impaired by requiring them to choose between repeal or a monumental expenditure that would bloat the federal budget deficit? Would not the vote of Congress in these circumstances be accountable to the Super Congress and thus be less than free?

The foregoing hypothetical fits the actual WTO agreement like a glove. The only difference is that WTO panel rulings leave U.S. law in place if the U.S. is willing to pay a hefty tribute, and the initiative to escape that penalty by repealing an offending law remains with Congress. But that modest procedural difference does not alter the sovereignty analysis.

Sovereignty is not maintained simply because a nation retains a choice between specific compliance with an international directive or economic detriment. It is no answer to the sovereignty issue raised by the WTO that the United States retains power to choose between economic retaliation and a change in its laws or practices or the use of section 301 of the Trade Act. A few analogous international examples are further instructive.

Libya confronts international economic sanctions voted by the U.N. Security Council for failure to extradite Libyan nationals suspected of complicity in the bombing of Pan Am flight 103. Isn't Libya's sovereignty impaired because of the economic coercion imposed for shielding the suspects in accord with Libyan law?

Cuba was subject to a naval quarantine during the Cuban Missile Crisis. Did the quarantine leave Cuban sovereignty unimpaired because it retained the option to choose in conjunction with the Soviet Union to continue to house Soviet missiles?

U.N. Security Council economic sanctions against North Korea seem impending because of the latter's flouting of resolutions concerning nonproliferation of nuclear weapons and nuclear site inspections. Would such sanctions leave North Korea's sovereignty unimpaired because the nation might choose to persist in its defiance?

The outstanding Security Council economic sanctions against Haiti for ousting President Aristide is another example of impairment of national sovereignty despite the power of Haiti's despots to retain their despotism.

Justice Joseph Storey explained that sovereignty is the "power to do everything in a state without accountability." Domestic decisions and laws of the United States are emphatically not unaccountable under the WTO because a choice to leave them undisturbed if in contravention of a WTO panel ruling is made accountable to an international body in the form of economic sanctions or compensation payments.

If the maintenance of United States sovereignty under international accords means no more than that the nation is permitted to violate any obligation and accept the international

law consequences, then sovereignty is chimerical; it would be unoffended even by a treaty authorizing Congress to declare war only with the consent of archvillain Saddam Hussein. A power to violate is always available to the United States so long as we are willing to fight signatories or accept other forms of coercion imposed because of the violation. Although sovereignty does not lend itself to a definition as exact as Euclidean geometry, any earthbound concept would find it impaired if a nation's complete independence in the enactment and administration of its laws is achievable only by paying handsome tribute to the international community.

II.

Threat of Biased Implementation

In addition to its constitutional frailty and impairment of U.S. sovereignty, the WTO agreement raises grave risks of biased implementation against the interests of the United States. A large percentage of panelists are likely to interpret WTO provisions in accord with the trade and economic prejudices of their home country. Although the charter stipulates panel independence, that injunction seems hollow regarding representatives of numerous signatory nations where the private sector is tiny and freedom nil. For instance, it would be unimaginable that a panelist from Cuba would not act as a shill for Fidel Castro, or that a panelist from Myanmar would not be a mouthpiece of SLORC. Further, even in many nations where the tyranny is less acute, the financial fortunes of their nationals who sit as panelists will pivot on the goodwill or favoritism of the incumbent government. They thus will be inclined to vote the latter's prejudices; and anonymity in three-member panel opinions only marginally alleviates that problem since deducing how individual panelists voted ordinarily should not prove difficult.

During a IMF-World Bank meeting last April, Willy Zapata, president of Guatemala's Central Bank, announced that the Group of 24 (consisting of eight nations each from Latin America, Asia and Africa) was contemplating a secretariat. The group urged wealthy nations to increase their support for poor nations through "improved access to export markets" and vowed action against industrial nations whose policies it feels "distort international market share." The group explicitly attacked the use of "environmental and social justifications for non-tariff restrictions." The WTO would offer a powerful instrument to advance their agenda.

Over 80 percent of WTO members will be developing nations, and they will thus enjoy the catbird's seat in the choice of the Secretary-General (who in turn selects panelists), and the Appellate Body. The United States will cast but one vote of 118 in selecting the Secretariat and acting on WTO amendments or ultimate interpretations of the charter. And the economic and trade philosophies of the panelists on the international bodies that would review U.S. law for compliance with the WTO will typically prove decisive.

On that score, the WTO charter might be likened to the United States Constitution, replete with open-ended terms that invite the smuggling of prejudices in the guise of interpretation. WTO concepts of dumping, subsidies, unjust discrimination, "least trade restrictive" environmental, health, or safety laws, and "unnecessary obstacles to international trade," for example, are as elastic in application as the equal protection and due process clauses of the Fourteenth Amendment. Phosphorescent Senate fights over Supreme Court nominees acknowledge that the philosophy of Justices is a good proxy for their voting propensities in particular cases. Senator Joe Biden (D-Del.), for instance, would probably vote opposite Justice Antonin Scalia on the scope of privacy protected by the due process clause if the former were elevated to the High Court.

Similarly, with regard to dispute settlement panels under the WTO, the trade and economic philosophies of international panelists—which may be wildly at odds with free trade or other United States interests—is likely to precipitate biased, not evenhanded decisions. Amendments to the charter by ⅔ votes and binding interpretations by ¾ majorities are also likely to be skewed against the U.S. for the same reason. Since the number of interpretive disputes and amendments is endless and could affect matters ranging from food safety and clean air to civil rights and economic prosperity, such systematic bias should be a source of deep worry. The interests of the U.S. in free and fair trade consistent with equally urgent general welfare goals would not seem to be advanced by entrusting implementation of WTO to a preponderance of signatories whose commitments to the same aspirations are problematic. Even if initial pronouncements do not betray bias, the cardinal decisionmaking rules of the WTO will lie around like a loaded gun creating a perpetual danger to the United States.

• • • • • •

The trade benefits of WTO are enticing to many, but its revolutionary innovations in dispute resolution and amendments counsel at least sober second thoughts before enactment. The values vindicated by turning constitutional square corners and insisting on fairness in decisionmaking seem more important than the immediate economic gains prophesied by WTO evangels.

Mr. MATSUI. Thank you very much, Mr. Fein.

I will be very brief in my questions. We have at least three others that will be asking questions.

I would like to really direct my attention to you, Mr. Fein. You analogized John L. Lewis, United Mine Workers, and of course the WTO. And obviously with respect to the former, we do have enforcement powers. You are a lawyer, one of the most prominent lawyers in the country. If, in fact, John L. Lewis and the United Mine Workers should have rejected the restraining order or the fine, they could have been, under the police power, put in jail. They could have been held in contempt of court.

Mr. FEIN. Yes, they were held in contempt, Mr. Chairman.

Mr. MATSUI. So there were remedies available. *Brown* v. *Board of Education*—you can cite a number of U.S. cases where U.S. citizens were involved. With the WTO, where is the enforcement power except world opinion and a consensus?

You mentioned that if the WTO renders a ruling, then there will be an enforcement. Where is the enforcement? How can they actually make us change our laws unless we willingly do it?

Mr. FEIN. They can't make the United States change its law. What they can do is order us to pay compensation.

Mr. MATSUI. And if we decide the ruling was unfair and we didn't want to pay because of budgetary or other reasons pay the compensation, we could just refuse to do it. Where is the enforcement?

Mr. FEIN. I understand that. But——

Mr. MATSUI. You see, that is the whole issue of sovereignty.

Mr. FEIN. I don't think so, Mr. Chairman, for this reason. If that is the definition of sovereignty, which I don't accept, then sovereignty can never be impaired, because we can always walk away from an obligation.

Mr. MATSUI. Well, we don't have much of a rule—or a body of rules with the Chinese. Let's say that the President had decided to withdraw MFN status for the Chinese on June 3. The Chinese then would have possibly, most likely, retaliated in a severe way against the United States. Our exports to China would have been perhaps cut off.

That would have, from your definition, if you use your North Korean example, impinged upon our sovereignty.

Mr. FEIN. No, no, because we hadn't agreed to that. The difference is, we agreed, we have made an international obligation if this WTO Charter is ratified. It seems to me you are taking the same view of an international agreement as the German Chancellor did in World War I. He said, what is the neutrality agreement of Belgium? It is a scrap of paper.

Now, if we want to live in something other than the law of the jungle, we have to be serious when we sign documents and ratify them, make them part of our law, and say, it is really just a disguise, if we don't like it we will just walk away from it.

Mr. MATSUI. I am sure that we will probably, 99.999 percent of the time, agree with whatever rulings will come down. But we will always leave as an option the right to withdraw from the WTO or defy the rulings if we think they are badly unfair. I really don't see what the problem is.

I mean the United Nations, nuclear arms agreements we enter into with other countries, but we are bound only by world opinion and by consensus, not by any enforcement powers.

Mr. FEIN. Well, I understand that. But that is true of every—but what I want to underscore, Mr. Chairman, is that observation applies to any agreement that we could ever sign. And, sure, I am saying if all sovereignty means is, you are willing to fight to reject an international law obligation, sure, by definition you can never have an impairment of sovereignty.

Suppose, for example, we had an agreement with the Barbary pirates in 1803. We get to sail into the Mediterranean with our ships, but if you tell us we can't, then we have got to pay you some kind of tribute. You know, we fought a war over that, because we thought we weren't going to pay tribute. We thought in 1803, when we were given a choice by Tripoli in North Africa between paying up tribute or exercising our right, what we thought of international freedom of the seas, we thought that was sovereignty impairment and went to war and defeated the enemy.

Mr. MATSUI. Let me say this, and I will yield to the other members of the committee. We don't need a WTO to enter into war. I mean, we have done that many times in the past without having some international organization. I think, frankly, this organization will help establish some rules that perhaps less-developed countries, Third World countries, who were inclined not to agree with international standards, might comply with.

I think this is clearly to the advantage of the industrialized developed countries.

Mr. FEIN. Well, that may well be. I think, Mr. Chairman, however, that may be an illusion for the reason that the general concepts, I think, of fair trade—antidumping, countervailing duties, technical trade barriers and all those sorts of things—they are very open-ended concepts. You can smuggle in a whole host of prejudicial viewpoints under those rubrics, and the panelists are not going to be majorities representing U.S. views. The panelists are going to largely be echoing these less-developed country views.

If you could just let me read, for example, something that is already ominous and on the horizon. And this relates to a contemplated—I guess, whether you could call it a cabal or otherwise, it would be among 24 LDCs. Indulge me for 1 second here.

At a recent meeting they had voiced objection that the United States and the rich countries were not paying enough to help Third World countries, and they adopted a resolution that suggested that they would gather together and——

Mr. MATSUI. If I may, we have a vote. I would like to call Mr. Thomas and Mr. Gingrich. Could you submit that?

Mr. FEIN. Yes, I have it here. This was during an IMF-World Bank meeting last April. Willie Zapata, president of Guatemala Central Bank announced that the Group of 24, consisting of eight nations each from Latin America, Asia, and Africa was contemplating a Secretariat.

The group urged wealthy nations to increase their support for poor nations through improved access to export markets and vowed action against industrial nations whose policies it feels distort international market share. The group explicitly attacked the use

of environmental and social justifications for nontariff restrictions. The WTO, I submit, would offer a powerful instrument to advance their agenda, and I don't think that this particular organization in Central America is going to be at all unique on the annals of history of the WTO.

Mr. MATSUI. Thank you. I appreciate that.

Mr. Thomas.

Mr. THOMAS. I may not be able to conclude this segment.

Mr. Fein, I am trying to get a feel for fundamentals in terms of the three of you who spoke against it. And, Dr. Lovett, would I be correct in saying that your basic complaint is, if you will allow me to characterize it as a "woulda, coulda, shoulda" in terms of lost opportunities and it isn't a good deal and we are not smart doing it, but that you do not take a fundamental position that the U.S. sovereignty is cashed in under this agreement?

Mr. LOVETT. I would not use the word sovereignty. I think the discussion at great length has clarified that that really isn't the right verbal term of art here. I do agree with your statement that we "coulda, shoulda, musta" gotten a much better deal and failing that, we are better off standing firm with GATT 1947. It has worked well. It has flex, it has safeguards, it does the job.

Mr. THOMAS. It is perfectly legitimate for people to disagree about whether or not it is a good deal. We can, I think, frankly use examples on both sides because you never get everything that you want.

I am currently negotiating with the USTR concerning some of the provisions regarding the generalized system of preferences and the dumping amendments. I think these concerns will be pretty critical to me in terms of my reaction to the larger picture. However, I did want to establish that, as I read your materials and listened to you, you lay out with clear specific examples why you thought GATT 1947 should have been continued rather than us going into a GATT 1994, holding out for a better structure that would not put us at the disadvantage you perceive the United States has been over the 1980s. That is a fair analysis of your——

Mr. LOVETT. If I might, sir, I could perhaps sum it up best by dramatizing the contrast between the GATT 1947, which is nothing more than a continuing arrangement by which occasional negotiations are carried out. It is in no sense a continuing body with its own agenda.

The monster created in the current GATT 1994 is going to be something with grossly distorted voting, unbalanced inherently in many ways inimical to the United States, and GATT 1994 doesn't have a weighted voting formula like we have in the IMF.

Now, it is a tricky thing to calculate how you would weight it. Clearly, you couldn't allow Europe's internal trade within itself to be a proper weighting vehicle. I think GNPs would be the best way.

Mr. THOMAS. Not yet, and that is one of the reasons they ran into problems in trying to negotiate it in terms of offering the various structures.

Mr. LOVETT. Since we got so little for the deal, why put ourselves into that foolish a straitjacket.

Mr. THOMAS. That is fine, because that is not the fundamental concern I have. We can always argue whether it is a good deal or

not and use examples. You believe your position is persuasive, and I assume others believe theirs is persuasive.

Mr. Choate, where are you on this cutting edge? Do you believe that the agreement in front of us—and I got the feeling of this from your testimony but I didn't hear a declaratory position—do you believe it violates the sovereignty of the United States?

Mr. CHOATE. Absolutely. We agree to abide by the charter.

Second, we agree to let the WTO review our laws as to the question of whether or not they impede global trade.

Third, we agree to a dispute settlement mechanism that is binding, and we agree to pay other nations if in that review process they find that our laws are trade impeding.

And to answer Mr. Matsui's question as to how will they make us pay, they will make us pay with trade sanctions in the other countries. As to this clean air ruling, if it goes to the WTO and if we lose and if it is $300 million a year, the Germans and the European luxury carmakers can impose a penalty, or Airbus can impose a penalty on Boeing, or the European semiconductor manufacturers can impose a penalty——

Mr. THOMAS. But, Mr. Choate, you said at the beginning of every one of the phrases that set up your argument "we agree."

Mr. CHOATE. That is correct.

Mr. THOMAS. Now if we agree to go under that structure, then it is not a violation of sovereignty. We may be stupid, it may be a bad deal, we may be duped, but if we agree, it does not affect our sovereignty.

Mr. CHOATE. It is a surrender of a sovereignty rather than a takeover of sovereignty, but the net effect is the same.

Mr. THOMAS. No, it is not the same. We can agree to do it or we can agree not to do it.

Mr. CHOATE. If you give it voluntarily as opposed to giving it at the point of a gun, the effect is the same. It is a loss of sovereignty.

Mr. THOMAS. If we can give it, then we can take it away, therefore, it is not a violation of sovereignty.

Mr. CHOATE. But we pay. But we pay.

Mr. THOMAS. We can choose to let the whole structure collapse.

Mr. FEIN. Mr. Congressman, I could amplify.

Mr. THOMAS. I will get to you in 1 minute. I have 3½ minutes to vote. I will be back.

Mr. MATSUI. I think it would be better—I think we will have to take a 5-minute recess and I will be right back.

[Recess.]

Mr. MCDERMOTT [presiding]. The committee will be in order.

The witnesses will resume their seats. My understanding is that Mr. Thomas was in the midst of an inquiry and when the witnesses have resumed the witness table, we will begin again.

Mr. Thomas.

Mr. THOMAS. Thank you, Mr. Chairman.

Mr. Fein, it is difficult, but I have tried to follow some of your hypotheticals and analogies in terms of examples in which the United States was placed in dire jeopardy. Some of the analogies were violations of sovereignty of other countries. I think you used Algeria, North Korea, Haiti, Cuba, and maybe another example.

Those actions against those countries, was the United States a principal participant, an essential participant or a necessary participant in those activities in those other countries in terms of denying the other countries what I think rightfully could be defined as their sovereignty?

Mr. FEIN. Well, we certainly were the central participant in imposing the naval quarantine around Cuba.

Mr. THOMAS. Don't you think if we take action against North Korea it would largely be done because the United States is willing to play a major role in the action?

Mr. FEIN. I certainly agree with that.

Mr. THOMAS. I think you will find that in almost any analogy in which you are going to argue that the sovereignty of a particular nation was violated for whatever outrageous act against humanity or citizens of other countries, I think you will find the United States would either be the principal instigator or the principal propagator of that position.

Mr. FEIN. I think your history is absolutely accurate. Let me, however, voice some concerns why I don't necessarily think that pattern will persist.

Mr. THOMAS. Let me draw my conclusion before you cut me off——

Mr. FEIN. I apologize.

Mr. THOMAS. It is the United States that defines sovereignty to a very great extent around the world today. Your concern is that this body will be able to impose on the United States something that the United States either has not agreed to or is unable to resist.

Mr. FEIN. Well, we are not—we cannot rightfully resist it because we have agreed if we ratify the WTO to accept the rulings of the dispute settlement boards over our—in evaluating our laws for conformity.

Mr. THOMAS. If we believe there was collusion and misrepresentation in the conclusion, don't we have a right to say that we don't believe the dispute settlement board followed the agreement and therefore reached an incorrect ruling?

Mr. FEIN. No. We are bound, the rulings of the WTO are final authoritative. We accept them as legitimate under our—if we ratify this document, even if in a particular case we think the cards were stacked against us. I think you have hit the point right on the head, Mr. Thomas.

Mr. THOMAS. I think you will find that if a panel decision is outrageous there will be movement toward us and toward others. Meetings will be held. The sovereignty of the United States will not be violated by this structure.

One additional question regarding your remarks. Again, you used the analogy that the WTO is a surrogate Federal court of the United States.

Mr. FEIN. Yes, sir.

Mr. THOMAS. Then you begin talking about the appointive powers of the President under article II. It is clear there are some so-called courts that have been established under article II, for example, the Tax Court of the United States, but it is not a Federal

court as we know Federal courts under article III, the judicial article in the Constitution.

Were you indicating that the WTO was like a Federal court created under article III or a tax court created under article II?

Mr. FEIN. Well, I think we need to distinguish here between what we would call article III and nonarticle III courts as opposed to any officer who is entrusted with enforcing U.S. law being required to be appointed under article II. I think I can explain where I think you are a little bit inexact in your analogy.

Mr. THOMAS. I asked a question I didn't make an analogy. I asked if the court you were talking about when you used the phrase "a surrogate Federal court," was an analogy of the surrogate Federal court under article III or article II?

Mr. FEIN. Well, it would be—the law students would call article I courts, which mean those jurists don't have to have life tenure and they are not necessarily protected against reduction in compensation, but whether, Mr. Congressman, they would be exercising article I power or article III power, they nevertheless would have to be appointed pursuant to the appointments clause in article II, namely whether they were to serve life or not, whether they are to exercise article III or article I powers.

Mr. THOMAS. I think it goes beyond the mere appointments clause. It goes to whether or not Congress has a role in defining who they are, how they operate, whether they are funded, the way in which they are funded, and whether they exist.

If they are under article III, they have an entirely different life structure, and I was a little concerned about the confusion that may have been presented because I was initially confused when you used the term surrogate Federal court. So you were not referring to article III type courts?

Mr. FEIN. Well, a Federal—right. I think, however, it is fair to say that a court can be a Federal court, even a tax court is a Federal court even though it is not an article III court.

Mr. THOMAS. That is why I asked the question. Was it an article III or an article II court? They are significantly different to me.

Mr. FEIN. But the reason why——

Mr. THOMAS. And fundamentally different under the Constitution.

Mr. FEIN. Well, I think for some purposes that is correct. What I was focusing on, Mr. Congressman, was that whether or not they are article I, article III or even nonjudicial officers of the United States, whatever exercise of power they are taking under U.S. law, they must be appointed under article II by the President or by a Cabinet officer or some other officer of the United States identified by Congress, and the difference between that provision and the way the WTO works is that those who will be exercising what you would call either an article I power or article III will not be appointed by the President, will not be appointed by a head of a Cabinet office, will be appointed by the Director General of the WTO, which does not fall in any of the categories that are entrusted with the appointments power for those who are going to enforce or interpret U.S. law.

Mr. THOMAS. I think you will find the Constitution allows others besides the President, to create those positions. Furthermore, by

approving the WTO structure under U.S. law, it falls in the same category.

Anybody want to respond to this court question? Mr. Lang.

Mr. LANG. Well, there are several things, Mr. Thomas, that I think the committee ought to take into account. For one thing, the question of *Buckley* v. *Vallejo* in the appointments clause came up in connection with congressional approval and implementation of the U.S.-Canadian Free Trade Agreement, which had a much greater intrusion alleged on the appointments clause than these WTO panels.

In the case of the U.S.-Canadian Free Trade Agreement, panels were set up to substitute for U.S. courts of appeal in appeals from administrative determinations in antidumping cases, and so the question was much closer to this assertion than the WTO is, and in that case the Congress went ahead and fully implemented the agreement but created a special channel for Supreme Court review if the constitutional issue arose. I don't believe it has, and in any event those panels continue to operate, interpreting U.S. law.

Now, the situation with the WTO is different. Several witnesses this morning have told you that these panels are interpreting U.S. law. Actually, they are interpreting the trade agreement, and those are the standard terms of reference which panels are given. U.S. law may or may not be a fact, and there may be questions of fact about what U.S. practice and law is, but the panels are not interpreting U.S. law.

Mr. THOMAS. Are you through? Go ahead if you want to make another point.

Mr. LANG. There were one or two other things that I thought I ought to have the chance to say here during this discussion. One is concerning the panelists themselves. I think there is perhaps more concern about these panelists than there should be under modern circumstances.

It was true 20 or 30 years ago that the choosing of panelists was an ad hoc process, but beginning in the 1980s and especially since the adoption of something called the Montreal Rules in 1989, we have developed a series of procedures for choosing panelists intended to assure that they receive a kind of consensus support as people who will be objective, not unlike the NAFTA, for example, where we have rosters of people who are eligible to be panelists. A similar kind of process now informally operates in the GATT. And even more important than that, in my opinion, is that the panels are now much better staffed than they ever were before so that they are provided with a legal background in the instruments they are interpreting that they did not have at the beginning of the process.

I think, and Ambassador Jules Katz is here—he has years of experience in the GATT, so he may second guess me on this—but my impression is that panelists who are not objective would have a very difficult time being accepted by either the disputants or the Secretary General as panelists under the WTO.

Mr. THOMAS. As an analogy paralleling the same timeframe, Olympic judges in various sports, primarily the summer Olympics in gymnastics, used to be outrageously nationalistic. In ice skating we used to look at the scores and it was just embarrassing how

much the judges would slant the scores toward their particular country's representative, no matter how many times the skater fell down. However, in recent years we have seen a change, again a pressure, largely from the Korean Olympics where there were such biased calls that they set up a structure that would guard against nationalism. The Olympic Committee began screening in terms of the professional capabilities of judges. The staffing and the mechanics of the execution of the decision was professionalized, and I think that analogy would apply to the way in which the judges are being changed.

I have no problem, and I am willing to argue from sun to sun about the failure of the United States to play all its chips properly to restructure the world trading order in a way that gives us an unfair advantage if we could get it, a fair advantage if this one doesn't, or the stupidity of our negotiating team through three administrations. I am willing to argue that from sun to sun.

I have a very difficult time and will not accept the argument that if we agree to a document, if we agree to place ourselves under rules, that this is somehow a violation of our sovereignty. To me the real-world definition of sovereignty is having an act, a decision imposed upon you against your will. Algeria experienced it, possibly North Korea will experience it, Haiti has experienced it, Cuba has experienced it. Those are all violations of sovereignty.

I do not believe the United States voluntarily entering into a new world trading order is a violation of U.S. sovereignty, and that is my primary concern. I would not support any structure which does not allow the United States to exercise its sovereignty.

As to whether or not it is a good deal, that is going to be an open question, and the real world will determine it just as the real world will determine whether the U.S.-Canadian Free Trade Agreement, the North American Free Trade Agreement or any other agreement we enter into was a good deal for us or for the other partners in the deal.

Thank you, Mr. Chairman. I would yield, or I would ask the Chair if—Amo, do you want to go?

Mr. McDermott. Mr. Houghton.

Mr. Houghton. Thank you very much.

I don't think I will take very long, but I would like to sort of switch the emphasis from not quite so legal to a little more practical, and frankly I would like to direct this to you, Pat, if you would like to, because you and I have known each other over the years, but if anybody else would like to chime in, go ahead, I have been around this barn for years and years and have been helped and hurt by international trade arrangements, and it seems there is almost no legal agreement you can come up with that you can't find some way of getting around unless the intent is right, and many times it is not. So what you are trying to do is to put up a structure to make it easier and fairer. To get something you had to give something, and now we are giving a tad on the sovereignty issue, but I really wonder whether we are.

For example, isn't the enforcement mechanism really to make sure sovereignty is held sacrosanct in the marketplace? It always has been. If somebody votes against us, if somebody does something which is an egregious error in terms of what we consider

international fairness, somehow our marketplace is going to retaliate, and we may not be able to do that forever. In the final analysis, if a Third World country or all the Third World countries vote against us, that isn't a very smart move because they are dependent not only upon our foreign aid but also access to our markets, and our trading considerations. So that is No. 1.

The other thing is, ever since 1945—and we have talked about this before, Pat—we have been giving away economic rights for political concessions, and the last guy out of the Oval Office is usually the Secretary of State or the Secretary of the Treasury. It is not the USTR. It is not the Commerce Department, it is not a businessperson, it is not a labor leader, but it is somebody from those two agencies, and usually their position has been hands across the sea. We have got a geopolitical consideration. We can't upset anything out here, and frankly, with this type of structure, we may be creating a law to help us, although we don't really know it at the time, because there is something out there which will set precedent after precedent. Frankly I would think it would help us. Now maybe you could react to that statement.

Mr. CHOATE. My reaction is as follows: The United States, particularly as the remaining superpower, has assumed a special role in the world, and that role is to advance open markets. It is to maintain the integrity of the global trading system. I think that what will happen in the future, as in the past, is we will make special efforts to preserve and to save the global trading system. In the future, as in the past, we will make concessions, even if they run against the United States and even if they are very unfair to the United States.

What I like about the current GATT structure is that ultimately it sets out rules, but in enforcing those rules it is a forum for negotiation, for compromise. It guarantees through the veto that the great powers really can't take great advantage of the small or the developing nations, and at the same time it guarantees that we can't be ganged up on.

Yet, when you take a look at the GATT's preservation of rights and obligations and the encouragement it gives to negotiate and compromise, and then you take a look at what the WTO will move us to. It will be very legalistic, it will be very formalistic, it will be very political, it will be a process where nations will be seeking and getting votes. It will also be, I think, a major source of conflict in these dispute settlement panels because they are going to have a star chamber quality in that they will be secret. The public cannot know what they do.

Inevitably, if nations lose a decision they are going to feel that they were cheated in the process. There will be great concern about a small narrow elite of trade officials who make the decisions.

Mr. HOUGHTON. Could I interrupt you for 1 second? Assuming you are right there, there is a sort of an overwhelming urge to do something here. Your something may be different from my something, but it is the attitude of opening up realistic markets, whether there is some sort of disciplinary process, and signaling to the world we really are serious by putting some of our cards on the table for other people to play. From an economic standpoint, if not a legal standpoint, the process does something that we just don't

have any idea, and frankly I think it is almost worth the risk because we can draw back if it doesn't work.

Now, under the present GATT rules that is not possible because in the mind it is not possible.

Mr. CHOATE. If I could make one concluding comment, it is to draw a business analogy. To adapt the WTO would be almost as though the Business Roundtable were to come to the Congress and say to the Congress we are having trouble with some small businesses and other groups, and so we would like to alter the rules on litigation and corporate liability to make it much easier for the plaintiff bar to sue business because we wish to sue these small businesses.

The truth is when one takes a look at the plaintiff bar here and when one takes a look at litigation practices globally, it is going to be the United States that will be the principal defendant in these WTO cases. The reason other countries haven't mounted excessive numbers of GATT cases in the past is because of the U.S. veto. Once the veto is eliminated, then I think that we will see hundreds or thousands of cases challenging individual laws and practices in the United States for a very simple reason: We are rich, and they can win, and there is money at the end of the trail here, and that is, I think, going to propel the United States into litigation and conflict that we can't even imagine at this point.

Mr. HOUGHTON. Maybe you have a comment or two. I am sorry to take so much time. I guess the point I am reaching for is this, throw this out, bring in something else, keep what you have got. Nothing is foolproof, and the question really is what stimulates trade, irrespective of the legal consequences, and if that does it, and you still have the opportunity to pull out, and works, it seems to me like a pretty good tradeoff.

Mr. LOVETT. Could I comment on that?

Mr. HOUGHTON. Sure.

Mr. LOVETT. I think you posed a crucial issue very skillfully, but I come out differently. The issue is how we best cope with the world marketplace and long accumulated structural trade deficits where we haven't adequately defended our own industrial interests in the rest of the world.

Now, we have plenty——

Mr. HOUGHTON. If I could just interrupt 1 minute. When you take a look at the egregious wound, it is with one country, because we do pretty well with the others.

Mr. LOVETT. I agree up to a point, but I have great respect for the Japanese. I had a wonderful sabbatical there 11 years ago, and I think they have earned what they get in the world marketplace by very hard work and skill. They have trained themselves to learn difficult languages. I would rather not——

Mr. HOUGHTON. I don't think you should get into that argument because I could stay here all day on that one.

Mr. LOVETT. Could I come back to what I think is the fundamental question?

Mr. HOUGHTON. Absolutely.

Mr. LOVETT. But I do think GATT 1947 is the best bargaining framework for us to have. In GATT 1947 we have the offsets, the safeguards, and the flex. But GATT 1994 is a straitjacket in which

all we can hope for is adverse GATT panels, combined with, most tragically, a guaranteed and built-in asymmetry in the playingfield. I will go for GATT 1947 any day of the week.

Now, we haven't used our tools adequately under GATT 1947, but I think we had this legacy that we were the leader of the free world, and had to save the world from communism. Fortunately, at least for some years now, that responsibility no longer operates in a post-cold war environment.

What are America's priorities now? My God, we have got this mess—huge accumulated structural unemployment, widespread discontent, civic disorder, and a breakdown in the teamwork that you and I grew up with in our culture. It is scary. We can only recover by restoring full employment and a decent manufacturing base. So let's use the framework that works better. I am scared to death about GATT 1994. It's a trade straitjacket in which we can't rejuvenate the American industrial base and restore full employment.

Mr. WORKMAN. Could I talk a little bit about GATT 1947 before we move on from a business point of view? I mean, GATT 1947 was good for its time, but look at what it didn't do.

It didn't cover intellectual property, it didn't cover trade and services, it didn't cover trade-related investment measures. It had, as I think my testimony—the numbers in my testimony alludes to, it had or has a dispute settlement mechanism that even though we won 80 percent of the time, by the time we got a decision, the companies involved, many of them, had gone out of business.

There is one case that we tracked that lasted 12 years, and may still be going on because we stopped tracking it in February 1987, so GATT 1947 was probably great in the 1950s and the 1960s, but we are talking about the 1990s and the next century now, and it is a different world and the United States economically as well as militarily occupies a different position in the world than it did in 1947. I would suggest, at least from a business point of view and from the companies who are affected and who are trying to deal with—you have got to remember under the GATT, we are only talking about 117 countries.

We trade with 262 countries. There is another 145 out there, notably Taiwan and China, who are not members of the GATT, that we have to make due as best we can through bilateral arrangements, so I think just to say that GATT 1947 was wonderful and nirvana, yes, that is true in the 1950s and 1960s, but what GATT 1994 will do for us is help us for the next century.

Mr. FEIN. Mr. Congressman, I think that you have perhaps understated the critical issue. It is not just free trade.

Mr. HOUGHTON. Mr. Fein, could I just interrupt because I think this other gentleman had his hand up, and then we will go to you. Thank you very much.

Mr. LANG. Yes, it is Jeff Lang. I wanted to make a point about your balancing issue. For me, the reason this new agreement is beneficial from our country's point of view is that it makes more efficient use of our economic power.

In the current system, when we win these cases, they are usually blocked, and therefore in order to get the benefit of that victory, we have to use our economic power, and that means we have to retali-

ate without GATT authorization, which is a violation of the GATT, and it gets us into the situation where we are doing something right and we are being called the violator.

It has happened in wheat flour and a dozen other cases.

Mr. HOUGHTON. I don't know whether you have ever been in business, but you can retaliate without going beyond the law.

Mr. LANG. Yes, you certainly can, but not under this existing GATT system. Now, my point is this: We will for the foreseeable future have that substantial economic power because we are the largest importer in the world and that is what gives you economic power in these negotiations.

What we will get is an additional, very useful weapon, and that is, we will get the imprimatur of these panels which will be able to give us a way of persuading countries to do what they ought to be doing without having to use the retaliation threat or if we do use it, to use it much more efficiently.

It seems to me, it just gives us another option that we don't have now, and I can't imagine why we wouldn't want that, especially since using these threats of retaliation inevitably gets you into the Oval Office because they are so serious, they threaten all kinds of political consequences that Presidents inevitably get involved, whereas if what you have is some panel deciding that a country somewhere has done something that is inconsistent with its trade obligations, it doesn't need to go to the White House.

Ambassador Kantor is basically going to be empowered to go take care of that problem himself. It seems to me that means this system is usable by a lot more medium-sized companies.

Mr. HOUGHTON. Mr. Chairman, I am sorry to keep—I think I have done this too long. Mr. Fein did want to say something, then I am all through.

Thank you very much.

Mr. FEIN. It seems to me the focus solely on expanding trade is too narrow. This agreement affects the United States' attempt to balance oftentimes free trade goals with other goals, environmental safety goals.

Let me give you an example. It seems very clear under the WTO, that our so-called Delaney clause that seeks to eliminate any kind of carcinogen as a food additive or a color additive, even if there is not any clear categorical scientific proof that even a tiny residue of a carcinogen might cause cancer, that could be attacked under the WTO. And if it was attacked and Congress said well, gee, we don't want to pony up the money, or we don't want to invite retaliation if we don't comply, we could have another thalidomide scandal here because our view as to what is a legitimate tradeoff between fair trade and other goals doesn't happen to comport with what a panel views as legitimate, and the same thing could be said, for instance, with the set-asides that this committee and this Congress oftentimes creates for government procurement whether it is based on minorities or women or otherwise.

Those set-asides would be fencing out foreigners from getting—for bidding on those contracts. That civil rights goal could be imperiled by the WTO, and what we are saying in this agreement is not simply that we are trying to encourage trade. We are opening

up virtually a whole host of other nontrade laws for vulnerability to attack.

Mr. HOUGHTON. Thank you.

Mr. MCDERMOTT. If you would like to respond.

Mr. LANG. I would just like to say two things about these comments. First, you have to read the substance of these agreements. Both of those cases would be losers for those complainants. There is no way they can win.

In fact, when Ambassador Strauss negotiated the government procurement code in 1978 and 1979, Congress raised this very question about minority set-asides. He went back during the 90-day consultation period and renegotiated the agreement so that the minority set-asides were explicitly written out of the agreement, and they are still written out of the Government Procurement Code.

I mean, there are a lot of scary things you can imagine that won't actually happen because the agreements don't provide for that, and the panels are interpreting the agreements, not American law.

Mr. MCDERMOTT. Can I ask a question? I am not on the Trade Subcommittee, so my question may be a little off the point, but I read the press related to trade a little bit and I know that in India there was a great turmoil over the signing of the GATT, the government over there went through quite a bit, and as I listen to this argument here, what is not clear to me is I have always thought the Germans and the French and the Japanese were smart people.

Why are they willing to give up this national sovereignty to get into this? I don't read anything in any other country that they are complaining about this, so what is it that they are getting that we are not getting or what is the——

Mr. LANG. Mr. Chairman, I spend——

Mr. MCDERMOTT. I see about seven people ready to jump. Yes?

Mr. LANG. I spend about a third of my time in Europe representing American companies who are trying to export to the community, and so I read the European press maybe more than most Americans do.

I can tell you that this agreement is actually quite controversial in Europe. The French Government, for example, has raised the question of whether the Commission has the constitutional power under the Treaty of Rome to even sign the agreement, and there have been frequent demonstrations by farmers in Ireland and Denmark and France and Italy and Spain and Portugal.

Mr. MCDERMOTT. But over the WTO?

Mr. LANG. Over the WTO, yes, sir, you bet. It is really much more controversial there than it is here, but unlike the legislative system we have, where Congress has a constitutional role in the approval and implementation of these agreements, their governments are not necessarily there at the takeoff when the negotiations start.

There are no requirements for the kind of consultation that you have in these fast-track rules, so it is much more difficult for them to express their concerns about this thing in a governmental way because they don't have elected Congressmen.

Mr. MCDERMOTT. Why did their negotiators agree to this?

Mr. LANG. Well, they agreed to it because they thought it was in their advantage, it was to their advantage, and I think they will be able to persuade the leaders of the various European member states that it is to their advantage, but it is wrong to say that it is not controversial over there.

Mr. MCDERMOTT. Mr. Choate, go ahead.

Mr. CHOATE. Up until the past 2 months, the No. 1 selling nonfiction book in France was the book called "The Trap," and——

Mr. MCDERMOTT. "The T-R-A-P"?

Mr. CHOATE. "The Trap," and the book is a discussion of how this WTO agreement will ultimately provide global protection for capital and technology, market access back to the major world market, and how it would lead multinational corporations to shift their operations offshore, and as Mr. Lang says——

Mr. MCDERMOTT. Offshore from France?

Mr. CHOATE. From Europe, and so far a third of the German corporations have announced that they are going to be moving out of Germany. I take a digest every morning, called the Japan Digest that summarizes all of the Japanese papers on a daily basis, and what one finds consistently in the Japanese press is the Japanese look forward to this agreement. Because in this deal, like all other trade deals, the Japanese will be in full compliance in all cases, on all of the formal rules. But at the same time, the Japanese say time and time again that they are going to use this WTO arrangement to deal with American unilateralism.

In other words, they are going to confront our trade laws that deal with their unfair trade practices. They see it as very much in their advantage, and as Karel Van Wolferen, the Japan expert, the man who wrote the book the "Enigma of Japanese Power," has written, the Japanese bureaucrats, since that is a society that runs by rules and formal interpretations rather than laws as such, will have an absolute moral obligation to do all that which is necessary to take over the WTO and use it to their advantage in much the same way that they have been able to manipulate the votes on the World Whaling Commission.

It will be a question of using their foreign aid, the $10 billion of annual foreign aid to buy votes, the location of Japanese plants, facilities, and elsewhere, so other nations will support Japan. Finally, the rest of the world really resents American unilateralism.

They resent the fact that the United States, as the largest market in the world, has stood prepared in the past to use access to its market as a means of getting fair and free trade concessions from other countries. They are going to attempt to bell the cat with this agreement because what will happen here is we are agreeing, in this arrangement, not to use our economic strength in trade agreements.

It is very explicit in section 23.1 of the agreement that we will undertake no unilateral actions.

Mr. MCDERMOTT. Mr. Lovett.

Mr. LOVETT. On the European front, realize that their farm lobby has won a major victory. Back when the Uruguay round was launched by Clayton Yeutter formally in 1986, vast expectations for great new agricultural exports were offered that would offset some manufacturing losses.

Well, it turned out we got very little on that front, and at this stage, I think, I agree with what Pat said, the Europeans really aren't losing much and they are gaining a great deal by locking us into the straitjacket.

Also there is another thing, the Europeans realize that in the voting structure of this new WTO, they are in the driver's seat. Japan thinks it is OK because, as Pat explained, formally they are in compliance, and the way they handle trade very skillfully, they can still do what they want to do, which leaves us at the short end of the stick, without any effective leverage to improve our circumstances.

The real question is why we bargained in this way, with standstill as the premise since the mid-1980s. It was a very questionable strategy. Lang suggests that as an importer we have leverage. Certainly we did, and we still do, if we use it, but we haven't used it. That is the problem. I would like to switch a little bit to another structural issue.

Mr. McDERMOTT. Let me just get Mr. Workman's response to this question.

Mr. WORKMAN. Just to get to your point about whether or not the GATT Uruguay round agreement is controversial in other countries, the instance in India where you had 100,000 people demonstrate in the streets, it was not so much over the dispute settlement mechanism in the Uruguay round of the committee, it was the fact that they didn't get what they wanted on intellectual property protection and on textiles, and it was very much engineered by some of the folks closely related to the textile and the intellectual property areas there.

Similar things have happened in Argentina, in Brazil. When you go back and you look at how this agreement finally came together, and this was very much a north-south concern operating throughout the eight years of negotiations, but what finally brought the negotiations to closure was essentially the Big Three—Japan, the European Union, and the United States came together and hammered out the agreement, and basically it was the European Union and the United States, and then the rest of the countries had to either buy into it or forget it.

Now, that is the broad political reality of how the negotiations came to conclusion, and certainly in the Third World there are to this day a lot of hurt feelings that they started in 1986 and went to the last day with high expectations that they were going to trade off their agricultural subsidies and what-have-you for access to the industrialized countries' markets.

The bottomline is they don't feel this is a good deal for them because they didn't get what they thought they could achieve, so from our point of view, from the U.S. business point of view, this is a—we didn't get everything that we wanted, don't get me wrong, but on balance, this is a very good agreement and most importantly it brings all these new areas under discipline that never existed before.

Mr. McDERMOTT. Let me ask, since you raised the question, that it was sectoral interests that brought it to a head in India, what are the sectoral interests in this country that are bringing it to a boil in this country?

Mr. WORKMAN. Well, from a business point of view, you have the textile sector and they can speak for themselves. They would like to have seen textile provisions more along the lines of what were in the NAFTA than in the GATT, especially as it relates to timing issues.

It is a 15 year phasein in the NAFTA, it is 10 years under the Uruguay round agreement. There is some—the audiovisual people that obviously did not get what they wanted, and we have continuing negotiations mainly with the European Union on that issue.

Some of the intellectual property people are disgruntled because of the long leadlines for the developing world to come to compliance. They would like to have seen shorter leadlines.

So you are always going to find some specific industry sector that has some complaint. If they said it was nirvana, then you have to wonder, oh, my God, what have we done here, but on balance, going across over 9,000 tariff items that are going to be cut over the next 15 years, some, if we get this thing passed this year, will take effect in January.

On balance, across the broad spectrum of American business, we think it is a good deal, and more importantly we want to focus on the medium-sized companies who are what some people call the infrequent exporters or the infrequent traders. There is about 105,000 companies that in 1987, according to the Census Bureau, which is the last year that we have data for this, that engaged in exporting.

Mr. MCDERMOTT. In the United States?

Mr. WORKMAN. In the United States. Now, compared to other countries, as a percentage of our business community to be engaged in trade and exporting, that is a small percentage.

It is in our interests to grow that group.

Mr. MCDERMOTT. Small in the number of businesses or small in the dollar volume?

Mr. WORKMAN. Small in both the number as a relative proportion of our overall business community, you know, half the Dutch companies in the Netherlands are engaged in trade. Here it is a very tiny percentage, and those 105,000 only account for about 15 or 20 percent by value of the exports in 1987, so they are not even the big exporters.

If we can grow that segment, we can add a tremendous boost to our economy, so these clear rules, these rules in a lot of areas where these medium-sized exporters are situated, it is a clear invitation on top of the NAFTA for them to go out and get engaged in international trade.

That benefits us, it benefits even the workers here because export-related jobs pay 17 percent more than a nonexport job in this economy, so that is why we are interested in it, that is why the small- and medium-sized companies in my organization are interested in it, and we hope that you are able to push this ball over the line, if you will.

Thank you.

Mr. MCDERMOTT. Yes, Mr. Lovett.

Mr. LOVETT. I would like to come back to the structural issue, and I think so much of the discussion here today——

Mr. McDermott. You have got to explain what you mean by structural issue to me.

Mr. Lovett. The question of the WTO, its voting and the fact that it is a continuing organization with a very activist agenda instead of an occasional arrangement to cut a trade deal, if it suits everybody.

I think the committee should realize there is a fundamental change here. We are going into a new structure. It is like a Maastricht arrangement. Europe is very Maastricht minded. They have grooved themselves in the last 5 to 8 years to think and work in that mindset.

It has become part of their legal and business and political culture, so they are very up to speed in taking advantage of the WTO framework and will take the lead in structuring it.

Now, the question I want to——

Mr. McDermott. What I find hard is you keep suggesting everybody else is smarter than we are. Is that what your premise is, we can't figure out how to use the structure or is it that the structure is wrong?

Mr. Lovett. I would like to get a right structure that is sound. I think part of the problem with GATT 1994 is that it is structured against U.S. interests. If you let me complete my thought——

Mr. McDermott. Tell me what the structure might be.

Mr. Lovett. I think an analogy would help you grasp the idea pretty quickly. Thatcher and the British for 20 years struggled with the problem that they went into the common market on structurally bad terms.

They had to accept a subsidy for agriculture and other burdens that was very disadvantageous to them, and yet their relative incomes in Europe had already sunk below the Germans, many other European countries, and they are on the lower end of the income scale now in Europe. They got stuck with an unfair arrangement. They couldn't get out of the structure that entrapped them.

The problem here with the WTO is the terms on which we enter this straitjacket. If we didn't have the subsidy provision, if we had strong antidumping and other flex positions that we enjoyed in GATT 1947, OK. But we are better off handling our interests in trade without this new GATT 1994 straitjacket. That is—I am terribly afraid that you are going to lock into place, if Congress accepts this thing quickly this summer, you are going to lock the United States into another 15 years of permanent, heavy trade and current account deficits, with a steadily declining currency and exchange rate that becomes increasingly adverse, a weakening industrial base. And then somewhere along the road politics in America will wake up to the fact that we have impoverished ourselves needlessly and foolishly—all because we made a bad structural trade deal in 1994.

Mr. McDermott. I know all figures of speech have certain weaknesses, but in a former life I was a psychiatrist, and the idea of the United States allowing themselves to be put in a straitjacket is an interesting one.

Mr. Choate.

Mr. Choate. In answer to your question, it seems to me the answer is simply to keep the existing GATT structure. It works. It

has worked very well for almost a half century. And then work with other nations to adopt the new rules of trade that will do what Mr. Workman says, bring other countries in and cover additional areas.

It is not very different, this circumstance, from what happened in 1947 and 1948 in which the United States considered adopting a new organization called the ITO, International Trade Organization, and some new multilateral trade agreements.

The United States rejected the ITO. Bit by bit we created the current forum, the GATT, and it has worked very well. We can do exactly the same thing.

Mr. McDermott. That seems like a rational way to have proceeded.

Why did that not happen?

Mr. Choate. Why did what not happen?

Mr. McDermott. Why didn't they take the existing structure of the GATT and add intellectual properties, financial services, and so forth, and bring in Rwanda and Burundi and all the other countries?

Mr. Choate. That was how the negotiations went up until the last couple of years. The World Trade Organization is a new concept that got added in the last couple of years in the negotiation.

Mr. McDermott. But why? Why could they not get an agreement to simply add a few more services out here that are covered and bring in some extra coverage?

Mr. Choate. Other countries wanted to cut our power to act unilaterally. Our negotiations——

Mr. McDermott. So we allowed them to cut our throat essentially?

Mr. Choate. Exactly. Well, if we approve this agreement, we will.

Mr. McDermott. Mr. Gingrich.

Mr. Gingrich. Thank you very much. Let me focus in on a couple of questions. I appreciate very much those who are critical being here, and I think they made important points. But I am actually more interested in those who are supportive to explain a couple things to me, some of which I took out of the comments of those who are more critical.

Mr. Workman, I have three or four questions coming out of your presentation. First of all, it seems to me that on page 1 where you point out the increase is a probable U.S. gross domestic product of up to $100 billion by the year 2002, and I agree with that.

In the various studies, as you know, the President has testified we will get about a $3.90 increase in revenue for every dollar in tariff cuts, which I certainly would agree with as a general principle of economic growth.

Is it the Chamber's position that in fact the GATT will generate more revenues than it will cost?

Mr. Workman. Absolutely, and we are trying to use the most conservative estimates that we can find, the $100 billion estimate is low ball, the Congressional Budget Office, I think, or the Clinton administration is using a $200-plus billion estimate in terms of the boost to the U.S. economy.

Mr. GINGRICH. Good. So in fact, for those of us who believe that the government should be accurate in its financial estimates, if we were to insist on using accurate economic projections to reach an accurate score on revenues, that that would not be an inappropriate thing from your standpoint?

Mr. WORKMAN. That is correct.

Mr. GINGRICH. Second——

Mr. WORKMAN. I also cite, you may note, the OECD estimate, which does not even speak to all the various component agreements of the Uruguay round agreement, does not account for services in a number of other areas, and that low ball estimate is $28 billion.

If you compare that to the $14 billion estimated cost over the 5-year period, at a minimum, it is a 2 to 1 return.

Mr. GINGRICH. So in fact the government will be making money out of this decision?

Mr. WORKMAN. That is correct.

Mr. GINGRICH. From somebody who doesn't feel like giving the government extra taxes even when they are losing money, it is extraordinarily hard for me to give it extra taxes when they make money.

On page 3, you describe two things as myths. I want to raise a general point here for 1 minute, and that is that there is no de jure sovereignty problem, I don't believe. I think I probably disagree with Mr. Fein on this.

As a historian, I think that we are entering a partnership, by definition, when you enter a partnership, you limit yourself in behaviors.

We are not yielding the ability to withdraw from the partnership, which would be the point at which sovereignty changes. We are, in fact, de facto submitting ourselves to certain multilateral decisions. We are saying we will behave as though that is a sovereign institution so that our behavior reflects a de facto shift of power.

Now, you say under myth No. 1, U.S. domestic law, including environmental labor and consumer standards would be threatened by WTO dispute settlement panel decision, you say this is a myth, this is on page 3.

How do you explain this morning's Washington Post story suggesting that if we lose the GATT decision, that in fact the CAFE standard will be threatened? The reason I am responding is it would not be changed by it, I agree with that, but clearly if you suddenly are told there now will be a $500 million tariff on U.S. car exports to Europe to offset the CAFE standard, the standard is certainly threatened or under pressure, isn't it?

How do you explain the Post story in the light of your testimony?

Mr. WORKMAN. Well, first of all, I don't accept it and I have at least three auto manufacture members of the Chamber who strongly believe that they are going to win in this dispute.

Mr. GINGRICH. Sure, but we are talking here about the mechanism. If, in fact, in the mechanism of the new agreement they were to lose that dispute, wouldn't they then have in fact the potential for an offsetting penalty against American exports by Europe?

Mr. WORKMAN. In the worst case scenario under the WTO dispute settlement mechanism, the initial retaliation that the Euro-

pean Union would be allowed to proceed against first the auto sector, then if there was not enough trade there and they could again, as was explained earlier today, they could only go up to the level of damage assessed to them, so, yes, and then in a practical de facto sense, that standard, the CAFE standard would come under pressure.

Mr. GINGRICH. So it could be threatened, to use your word?

Mr. WORKMAN. That is correct.

Mr. GINGRICH. In your judgment it is not likely, but it is not a myth? There is a big difference.

Mr. WORKMAN. It is not likely.

Mr. GINGRICH. Your second myth here, the WTO would prevent the United States from using its laws to address foreign unfair trade practices, isn't that precisely what happened in the tuna case?

Mr. WORKMAN. The tuna/dolphin case? However we have been prevented from using section 301.

Mr. GINGRICH. We have been told that we can't do it, that it is a violation of the GATT.

Mr. WORKMAN. Well, we have a GATT panel result or report that says that the Marine Mammal Protection Act is a violation of GATT disciplines, and we have had that report for a number of years.

Mr. GINGRICH. Right, but under the old rules, we simply ignore it. Under the new rules——

Mr. WORKMAN. No, this has happened under the old rules. This is a live case.

Mr. GINGRICH. So my point is under the old rules when we lost it, we ignored it. Under the new rules——

Mr. WORKMAN. We didn't ignore it.

Mr. GINGRICH. Well, we didn't, but we could have, we could have vetoed it, we could have said we don't agree with your decision.

Under the new rules, wouldn't Mexico and any other injured country automatically have the right then to demand the right to raise penalties on American exports to compensate for it?

Mr. WORKMAN. Yes.

Mr. GINGRICH. So in fact isn't it more accurate to say——

Mr. WORKMAN. They can do that right now. You don't need a WTO for them to do that. Actually they can block tuna exports from the United States to Mexico right now and be GATT legal.

Mr. GINGRICH. But I believe under the current rules, that that has only been done once in 45 years. I think actual retaliation under the GATT has occurred once.

Correct me if I am wrong because I am not an expert in this area. I think it was a Dutch case in 1952.

Mr. LOVETT. Right, it is very infrequent.

Mr. LANG. It is extremely rare.

Mr. GINGRICH. I am just trying to walk through this mechanism here. So the WTO could in fact cause the United States to pay compensation if the United States uses its laws to address foreign unfair trade practices, that is, if we unilaterally do something, we could be compelled to pay compensation?

Mr. WORKMAN. That is correct, as could other countries.

Mr. GINGRICH. You go on to say here, and I frankly totally didn't understand this, so I hope you will explain it, the top of page 4, "if the United States is a defendant and loses a panel decision, it still retains the power to disregard the panel's decision and take unilateral action that is in the national interest."

Mr. WORKMAN. Yes, that is with the discussion.

Mr. GINGRICH. All right. Now, my question for you is isn't it true that the panel retains the power to then compel compensating damages if the United States does that? So yes, we have the power to do it, but we have in fact now yielded to that panel the right to in effect fine us for doing it.

Mr. WORKMAN. Well, we have agreed within the context of this contract that we are about to sign with the 116 other countries. Without the contract, everything that you are talking about could still occur, but there would be no discipline, there would be no rules.

Mr. GINGRICH. I am not necessarily objecting. What I object to is not that we are trying to create a world system of discipline. I object to the fact that people keep telling us the discipline will only apply to everybody else.

I am just saying we need to be honest about the fact that we are transferring from the United States at a practical level significant authority to a new organization. This is a transformational moment. I would feel better if the people who favor this would just be honest about the scale of change.

I agree with you, this is very close to Maastricht, and 20 years from now we will look back on this as a very important defining moment. This is not just another trade agreement. This is adopting something which twice, once in the 1940s and once in the 1950s, the U.S. Congress rejected. I am not even saying we should reject it, I in fact lean toward it. But, I think we have to be very careful, because it is a very big transfer of power.

Now, yes, we could in theory take the power back. Yes, we, de jure, as Bork points out, can take the power back. But the fact is we are not likely to disrupt the entire world trading system 20 years from now. And, therefore, we ought to be very careful, because we are not likely to take it back.

Dr. Lovett.

Mr. LOVETT. That is why I would like to urge a reasonably generous period of time to go through this process. You have had a reasonably balanced panel here of five people, getting this kind of a serious discussion going. You are spending in this capital an enormous amount of time, over 2 years, to grapple with health care. Every year the Congress grapples with spending and tax allocation and priority issues. Why is it that in the weird area of international trade, somehow 20 hot shots at the USTR are trusted to come up with a little black box—you slap the free trade label on it and it goes through like a greased pig? That strikes me as a little odd.

Mr. GINGRICH. I am not sure the pig is greased.

Mr. LOVETT. I am overstating it. There is some hyperbole there.

Mr. GINGRICH. I am trying to scald the pig enough to take the grease off.

Mr. LOVETT. Well, I think you need 1½ years. There are lots of folks that would like to ventilate their feelings from all sorts of quarters. And then you would feel more comfortable if you hear from us all that you are making the right judgment.

Mr. GINGRICH. But let me say, Dr. Lovett, in fact, I mean we have now been for I guess 7 or 8 weeks looking for reasoned, systematic study of this topic. And I must tell you, the most amazing thing to me is how few people there are who actually study this. I mean what I believe is historic in what has happened is that the GATT is an essentially business contract trade area and has attracted people who are only interested in that zone, as a zone. I believe this is a transformational moment a la Maastricht and the Treaty of Rome, and that all the people who will later on from a political science, et cetera, background say, we should have been studying that, but we don't know anything about it right now. Everybody who knows a lot about the GATT knows remarkably little about the power structure of UNESCO and the U.N. General Assembly and the nature of political power once you establish a framework. And so people just talk past each other.

And all of my good friends who I respect immensely, one of whom—one of my mentors, Bill Frenzel, will lecture me in 1 minute on this—will all tell you that we shouldn't worry about this because we have 40 years of not worrying about it. And I am worried about it precisely because I agree with Mr. Choate's underlying analysis that this is a transformational moment. And, that inevitably when you establish an organization like this, you create power relationships, and that we are establishing a pattern here which is different from the consensual pattern of the past. It may take 20 years to break down, but there will come a point that the ability to vote will matter and tiny countries will matter and being anti-Western will matter.

Mr. LOVETT. The reason why there is so thin a literature, so little expertise, is the peculiar character and history of the GATT. After all, all it was, was a rather wonderful compromise for trade negotiations between one very rich and predominant Western country, the U.S.A., and some battered European ones, a few Commonwealth members, much smaller in scale, Canada, Australia, New Zealand, and other nations well down the scale of income.

It worked reasonably well as a set of rules with flex for these eight trade negotiations. But it was never intended to be a continuing system. Well, now we have suddenly transformed it, rather secretly, carefully, among experts.

Very few people understand the vocabulary, the meaning of all of this. And instead it has been carried on with a vague fast-track injunction from Congress going well back into the 1980s. Oh, you guys do something good about free trade there. Yes, we trust you to do it. Whatever you come up with. It has got to be OK. We believe in free trade. Sure.

Well, that is naive. It is inadequate. At this stage we need a good 1½ years of careful extended discussion. We took 12 years getting here. The GATT is a leisurely game, the world trade scene. If there was a serious risk of world trade breakdown, I would say, yes, there is something to worry about. But, good Lord, the world trade system has gotten stronger in the last 12 years. It has weathered

a lot of stresses, the Latin American debt overload crisis, the strains with Russia, and other difficulties and so on. Let's be deliberate and make sure that the structure we do go into, the Maastricht of the world economy, makes sense.

Mr. GINGRICH. Let me—very quickly, Mr. Fein. I just want to ask a few more questions.

Mr. FEIN. Yes. It is too abrupt. I think, Mr. Congressman, that simply to acknowledge that we can withdraw eliminates the sovereignty issue. You may remember at one time during the New Deal era, the Congress delegated vast legislative powers to the executive branch, as you well know as a historian, Congressman Gingrich, and the Supreme Court said even though Congress could renounce the delegation at any time, that it was still unconstitutional.

And I think the analogy would apply here, even though we can restore our sovereignty at any time, I don't think constitutionally you can delegate it, even provisionally. And that constitutional issue, which has been raised in a less acute form under the U.S.-Canada Free Trade Accord, is pending in courts. There has been no decision on the merits, but it has been raised. And the record should show that the issue is not one that is resolved.

Mr. GINGRICH. I have two more questions for Mr. Lang and Mr. Workman. One is when the Director General of the GATT said and he was quoted at the end of Mr. Choate's testimony on page 4, "the least developed countries are winners." What do you think he meant by that? I mean why should we all be gleeful that creating an institution—by the way, I checked, it takes 92—the 92 smallest economies add up to the United States. So in terms of economic power, the vote is 92 to 1.

Mr. LANG. Well, least-developed countries is a defined term based on GNP per capita in U.N. statistics. I am not sure I know the exact definition, but that is how it is defined.

And under these agreements, least-developed countries have the longest time to come into compliance with these agreements. So the Director General might have been referring to that, but I suspect he was referring to a larger situation. By the way, I have no idea what he was talking about. I think——

Mr. GINGRICH. You think it should concern the United States? Winners sometimes implies losers.

Mr. LANG. I think that in general with respect to developing countries, this agreement is very important because it puts them under obligations they have never been subject to. Ever since developing countries began graduating into nationhood in the 1960s, they were accepted into the system without making concessions. So in effect, many of them were free riders on the system.

And that is a serious problem for us, because it allowed them to keep their trade barriers in place while getting access to our market. And among other things, that meant they didn't grow as fast as they would have if they didn't have those taxes and trade barriers in place. One of the most important things this agreement does is obligate all those developing countries to all the agreements, not just the ones they choose to sign, and to begin to bite on them very substantially. For example, take India.

Mr. GINGRICH. Wait, so your argument is that they are really winners because they now have to be submitted to a new discipline they weren't submitted to before?

Mr. LANG. Yes, exactly. I think you can see that in Mexico.

Mr. GINGRICH. I thought the less-developed countries, as defined by the United Nations, are precisely the ones who are not subjected for at least a decade to the new disciplines. I thought by definition they are excluded under the agreement.

Mr. LANG. Well, I am not sure whether he was referring to—you said least-developed countries. There is a difference between less developed and least developed. What I am saying is——

Mr. GINGRICH. Let me ask Mr. Choate for one sentence.

Mr. LANG [continuing]. Generally, developing countries are going to be subject to more disciplines gradually over time.

Mr. GINGRICH. Let me ask Mr. Choate for one just very, very briefly. What do you think he was referring to? Was it the U.N. definition?

Mr. CHOATE. I think he is referring, by and large, to the U.N. definition, which means that you have a category of countries that have full rights but they have limited obligations. And what it will mean for these countries is that they can become a locale for investment.

Mr. GINGRICH. And how many of them belong to the GATT?

Mr. CHOATE. Twenty-two.

Mr. GINGRICH. Mr. Workman, what is your——

Mr. WORKMAN. My comment is the advice that someone gave to I think Lyndon Johnson about the Vietnam war. I think that applies here, "declare victory and go home." I think that is what Secretary General Sutherland was doing after the GATT negotiations.

Mr. GINGRICH. OK. Let me say in passing that I strongly support Governor Thompson's testimony which he is submitting on working out in the implementation language the State participation and the dispute settlement process. I think that is very important that as we go through this that the U.S. Government's relation to the States and our ability to protect legitimate State law in a system which is unlike much of the rest of the world, is very important. And I hope to be able to work with the Governors Association. I talked to Ambassador Kantor about that after his testimony.

My last question for in particular, Mr. Lang, and Mr. Workman, since you favor the agreement, if you look at Mr. Lang's testimony, the full text, on page 5 he talks about the new appellate body. The WTO creates a completely new institution, the appellate body. Virtually all panel reports are appealable to the appellate body.

Unlike panels whose members will continue to be appointed ad hoc, the appellate body's members are limited to seven persons, presumably individuals, who are to serve in panels of three. These seven people, chosen by the WTO membership, apparently by majority vote, and I go on to say, I want to quote this, "but in practice probably by consensus."

What evidence do we have from the U.N. General Assembly or from UNESCO that "probably by consensus" is historically predictable? Why would either of you believe that 10 or 12 years from now a body totally dominated in voting power by Third World countries would not resemble the U.N. General Assembly? What evidence do

we have that any body that now has real power—remember, this used to be a consensual organization because we didn't legally belong to it. That is why it was consensual. We literally don't legally belong to the GATT organization.

Mr. LANG. Well, that is not quite true. No one belongs to it. It is a provisional organization. But that——

Mr. GINGRICH. Therefore, you can't have binding rules.

Mr. LANG. I beg to differ with you, sir. I don't think that is the reason why it has operated consensually. The reason it operates consensually and will continue to for a long time to come is that we have, along with Europe and Japan, enormous economic power compared to the rest of the world. It is very close to inconceivable that if the United States withdraws from this agreement, the agreement will continue in effect. And if——

Mr. GINGRICH. I agree with that, but it is also true if you threaten nuclear war, it is impressive. I mean the United States withdrawing from this agreement would be the economic equivalent of nuclear war.

Mr. LANG. Well, the fact is, if this agreement begins choosing appellate body members who are not objective and who serve only their own narrow government interests, this thing will become so obviously not in the interests of the United States that that will become a serious possibility.

Mr. GINGRICH. So wouldn't it be reasonable——

Mr. LANG. So, in fact, what will happen is that the strong consensus tradition of this organization will continue in the future.

Mr. GINGRICH. So wouldn't it be reasonable for us to write in that the executive branch should report on the appellate body's names and whether or not they were acceptable to the United States at appointment?

Mr. LANG. Yes, I think you ought to do several things about the appellate body. First, you ought to make sure that it is adequately funded.

If it isn't adequately funded, the quality of its decisions will be low. It won't have the clerking capability and all that kind of thing that it should have.

Second, I think you ought to assure that those staggered terms actually are staggered so that you have some control over who gets on the appellate body.

Third, I think you ought to pay attention to the initial formulation of the appellate body's rulings, which will be a process that begins at the ministerial meetings later this year. How those rules work, about submissions of briefs, the openness of the proceedings and so on, will shape this organization importantly. You have 1 million different—well, maybe not 1 million different, but at least 2 or 3 different ways of doing that.

The statement of administrative action, the legislative language, the committee reports, and just the cooperative environment that I could see this morning between the administration and the committee. I think there are a lot of ways you can shape the appellate body and I think it is important that you do so.

Mr. GINGRICH. Mr. Workman and Mr. Fein? This is my last thing, Mr. Chairman. Mr. Workman, any comments on that?

Mr. WORKMAN. No comment.

Mr. FEIN. I think it would be fair, you could extrapolate from the selection process for the initial panels, whereby the less-developed countries have a right not enjoyed by the United States or developed countries to insist that one panel be a representative of a less-developed country. And I think that would be sort of the floor that would be utilized in looking at the appellate body.

Say, well, if the LDCs have a right to insist that they be represented even though that doesn't apply to the developed country, I think that mentality is likely to carry over into the selection by the WTO signatories as a whole in choosing the composition of the seven members.

Mr. GINGRICH. I want to—Mr. Choate.

Mr. CHOATE. I wanted to make a comment in reference to Mr. Lang's statement that our economic strength is so great that the threat to withdraw will force other nations to take action. I would add as a corollary then that the threat not to join should also compel other nations to act as well now. And if that is to be the case, then there are some basic changes that should be made on the WTO appellate body. Of course the U.S. Government should have the right to approve the panelists. We should also insist that the procedure be altered in such a way that it is completely open, it is not run as a star chamber.

It should also be set in such a way where the ministerial council is open to the press and to the public of the world. And second, we should consider altering this organization in such a way, as with the United Nations, where we have a governing council of leading major powers and a rotating group of less-developed powers. As with the Security Council, you give the major powers, the EC, the United States, and Japan, and perhaps later on China if they qualify, veto powers.

Mr. GINGRICH. I just want to thank all five of you for being here and for helping us. I think today's hearings have been very, very helpful so far, and I really appreciate, Mr. Chairman, your generosity in allowing me to be with you.

Acting Chairman GIBBONS. Well, let me say, I appreciate your time that you spent on this. Been very helpful. You ought to come over and be an ex officio member of our committee. We could use your skills. I have learned something out of this discussion.

I regret to say that I have been awfully busy today and haven't been able to sit through all of it, but thank you very much for your contributions.

Well, we next have Hon. Bill Frenzel, who to this panel needs no introduction, and Hon. Julius Katz, also to this panel needs no introduction. Both of them have labored here long in this area, and are skilled in the theoretical as well as the practical application of all of these things.

So I know you have been sitting here since daylight this morning. I hope you had a chance to run to the men's room, but I won't inquire whether you have or not. And we just let you start off.

Why don't—I see Bill Frenzel is listed first on the roster, so Bill, you go ahead first.

STATEMENT OF HON. BILL FRENZEL, GUEST SCHOLAR, THE BROOKINGS INSTITUTION

Mr. FRENZEL. Thank you, Mr. Chairman. I am glad to be back here. I wish the committee were still observing the Burke rule, but I am glad that Jules and I will finally have our hour in the sun.

I would like to submit my statement for the record and make a few comments, Mr. Chairman.

The first of which is that having listened to the last panel, I am stunned by the very different interpretations that the mind of man can give to what looks to me like another liberalizing round of the GATT. Suddenly, your witnesses have made it into a transforming decision and a Maastricht. And we must wonder whether Fidel Castro and John L. Lewis are on the dispute panels. I must tell you: That isn't what you are looking at.

What you are looking at is a lot of money for the United States. This Congress went through a very difficult period approving a NAFTA. It did so to gain tens of basis points in GDP, at least as its economic reward. You are going to gain full percentage points under the Uruguay round. If the NAFTA, the critical symbol, was for show, Uruguay is for dough.

As you work your way through this, I hope that the prospect of huge economic rewards will not escape you. If you are talking about jobs, economic activity, increase in the human condition, or any of the standards by which we judge our progress in the world, this is going to lift them.

I do want to talk about a couple of items. I am going to glance past financing, because as my testimony indicates, that is an insider's game. You have some financing options. You will have to go through them. I have some ideas on where you are going to come out, but you will have to find your way through that thicket. That is not a trade problem. It is a financing problem.

The sovereignty question is one I also want to just touch on. Sovereignty raises its red herring head on every treaty the United States has ever engaged in, and every trade agreement. You simply have to decide what you get out of the agreement and what you give in the agreement. And no country in the last analysis will ever give up its sovereignty, and will always be ready to break from an agreement if it believes its sovereignty is threatened.

I think it would have been a good thing if we all could have listened to Senator Stevens' attack on sovereignty on the NAFTA in the Senate. It was really well done, but in the end the argumentation was not heavy enough to carry more than 21 percent of the Senate. There were some other questions about procedures, but I think Jules is going to get into some of those.

Those people who say this treaty was rushed through probably weren't around when you, Mr. Chairman, and I were to ratify the Tokyo round in 1979. It has taken us 15 years to rush through this agreement. And if all of us haven't seen enough of it, I am sure that the members who serve on your Trade Subcommittee have seen plenty of it.

And one of our previous speakers talked about a veto power that we used to enjoy in the GATT. If so, it escaped my knowledge and I think it escaped Jules', as well. What you got, Mr. Chairman, is

a difference in voting in the WTO and in the GATT that it would take an electron microscope to be able to find.

The main changes are that the negotiators made a dispute panel come to a conclusion. The aggrieved party can not stonewall as was possible under the old GATT. This committee and this Congress told our negotiators to do that in the Trade Act of 1988. Those negotiations faithfully carried out their duties and brought back an agreement which was just what the Congress told them to do. To suggest that there is some new sneaky way for new members to dominate old members, I think, is not to read the agreement, or to understand it.

There is also talk about the Secretariat dominating with great increases in size. It is my understanding that there will be some increase, but it is not going to be very large.

The last panel indicated the dispute panels would be perpetually against the United States. I don't think there is anything in our experience before or our ability to look into the future, that indicates that. Well, I am not going to comment further on some of the testimony you have already heard. That will be in the record in any case. But I do want to talk about two more important things.

One is that there were modest changes made in the Uruguay round on antidumping. Now I have never been a fan of antidumping. I now believe it to be the preferred weapon of protectionists in the United States, and I perceive that those who use it want to change the rules so that they can never lose a case. And for them, I am sure that is a wonderful idea.

However, I think if this committee or this Congress gets very far from the antidumping language of the agreement, modifies it too much, tries to make the U.S. law too protective, we are going to be in big trouble. I would only remind the committee, or I would invite it to remember, that when we assess a dumping penalty, that is assessed in the names of our least competitive industries. And when other countries assess dumping penalties against us, those are assessed on our most competitive, most successful exporters.

Therefore, in the case of dumping, we are often the biter who is bit. And we suffer more than we ever defend when we make our dumping laws more protectionist.

Finally, Mr. Chairman, I need to say something about the linkages that have been attached to this agreement. We have heard that we are going to solve the world's environmental problems, that we are going to set a whole new set of labor standards, and that we are going to do other nice things through the GATT, or through the new WTO. It has been my experience in trade that trade is never free of linkages and baggage. It carried national security for most of my lifetime. It has carried human rights, labor rights and other interests. And I don't think you can ever completely delink it.

On the other hand, to expect trade to carry the full load is a real mistake. If you want to go after the ozone layer or CAFE standards or something for the world, you are much better off to do it in an environmental forum.

You will note that when we tried to link human rights and MFN with China, that agreement, the MFN agreement, was not strong

enough to carry that linkage. And it had to be broken and established in another way. And so I would urge that this Congress and this committee be very careful about allowing the GATT to carry a lot of extra baggage over and above the trade load. The WTO will have enough trouble with trade, because it has enough critics.

So, Mr. Chairman, I think this is really important. I told many of you that the NAFTA was important, and it was, because without the NAFTA I don't think we would be here. But this is where the money is. And if you want to bring the money home to American producers, this is how you do it. I hope, I pray, that you will swiftly approve it.

Thank you.

[The prepared statement follows:]

Committee on Ways and Means

Testimony of Bill Frenzel
Guest Scholar, The Brookings Institution
June 10, 1994

The Uruguay Round Agreement of the GATT

Mr. Chairman:

I am grateful to you, and to the Committee, for the chance to meet here again on the subject of international trade. I am affiliated with the Brookings Institution, but the views I present are, of course, my own.

It will come as no surprise to members who served with me here that I begin by recommending that the Uruguay Agreement be ratified as swiftly as possible. In the thirty-one years between 1948 and 1979, with aggressive U.S. leadership seven liberalizing GATT Trade Rounds were completed. During that period, the United States and the world experienced the greatest expansion of economic activity, the greatest increases in GDP, the greatest job increases, and the greatest enhancement in the human condition in world history.

From that 1979 ratification of the Tokyo Round, it has taken fifteen years for the Uruguay Round to reach you. It is many years too late, but it is a magnificent achievement and one which deserves your speedy ratification.

My service on the Committee began the year after the Kennedy Round (# 6) was ratified by Congress. I participated in the ratification of the Tokyo Round (# 7) in 1979. Thereafter, I worked with all succeeding Trade Representatives to promote Round # 8 which is now the subject of this Committee's attention.

I was in Geneva in 1982 when Ambassador Bill Brock labored so vigorously,

and with such frustrating results, to begin a Round. I was in Punta del Este in 1987 when Clayton Yeutter worked so effectively to launch the Uruguay Round. Later, I was in Montreal and Brussels with Ambassador Carla Hills at ministerials which failed to conclude it. Cleverly working when I was not around, Ambassador Mickey Kantor was able to conclude the agreement. It has been officially in the works for seven years but, actually, is the culmination of a fifteen-year process.

Trade agreements are always complex, and never easy. This one may be the biggest and most complex of all. Fortunately, the Committee has had the benefit of close consultations with the administration's trade negotiators throughout the process and knows the dimensions of the agreement and most of its details. One hundred seventeen sovereign states signed the agreements. Trade economists tell us that it will add trillions of dollars to world trade.

Last year Congress passed NAFTA. It was a good agreement for the three participants, the hemisphere, and the world. It will have a positive effect on trade and jobs in the United States, but the increases it will cause in GDP can be measured in tens of basis points. Uruguay, on the other hand, while it boosts the world, will boost U.S. GDP in full percentage points. NAFTA was important, but the real money is in the Uruguay Round.

As you proceed in your vital role in the ratification process, you will get plenty of advice. Much of it will be negative. My general counsel is as follows:

1. The economics are overwhelming. Even so, some industries did not achieve their fondest expectations and will be disappointed. Others, protected industries, who usually oppose trade agreements, will do so again. You have heard from some of their representatives today. I hope you stick with the agreement. It can't please everybody, but it is a great benefit for our <u>whole</u> economy.

2. Financing is a problem. We are stuck on our own budget rules. This is an inside problem to be solved by insiders. I will be glad to tell how I would do it, but outside advice may not be helpful here.

3. Sovereignty, the perpetual trade red herring, has been resurrected here. Some of you will remember Senator Stevens's sovereignty attack on NAFTA last year which garnered twenty-one votes. The WTO voting system is similar to that of the current GATT. The principal change was one directed by Congress.

4. The anti-dumping forces are at work trying to fix up U.S. laws so that they will never lose a case. The best advice here is stick to the GATT text.

5. Another problem which I fear could be unsettling to ratification is the possibility that this agreement could be used to enforce decisions in non-trade matters.

Vice President Gore's Marrakesh speech sent shivers of panic through some trade sectors. Working on problems like the ozone layer, labor standards, and urbanization ought to be done in more appropriate fora. If these factors are overweighted in the GATT, they may have the same polarizing effect which, unfortunately, has soured other international fora in the past.

Mr. Chairman, this Committee has another opportunity to be a leader in enhancing the prosperity of our country and the world. I know it will, as it always has, take its responsibilities seriously. I pray it will lead in the ratification of the Uruguay Round

Acting Chairman GIBBONS. Thank you, Bill. And I remember your voyage down to Uruguay—how many years ago? Many, many years ago, to get this round started.

Mr. FRENZEL. 1987.

Acting Chairman GIBBONS. Yes, let's go to Mr. Katz, please. Jules, it is great to see you back here.

STATEMENT OF HON. JULIUS L. KATZ, PRESIDENT, HILLS & CO., WASHINGTON, D.C.

Mr. KATZ. Thank you, Mr. Chairman. It is a pleasure to be here and I appreciate your invitation.

Let me say first that I am appearing in a personal capacity. I represent no party on this issue or any other issue before the Congress. You have heard a great deal of testimony today and I don't want to repeat a lot of it.

Acting Chairman GIBBONS. We will put your full statement and Bill's full statement in the record in their entirety.

Mr. KATZ. Thank you, Mr. Chairman. Just a few brief points.

First, the World Trade Organization, as provided for in the agreement, responds directly to the negotiating objectives and mandates expressed in the 1988 Trade Act. So I think that it is a win for the United States, and it meets the objectives of the act in at least three—in at least three areas.

First, in respect of dispute settlement. Indeed, the provisions with respect to dispute resolution are largely the result of the U.S. proposals and perseverance of U.S. negotiators in pressing for those proposals.

Second, the act calls for enhancing the status of the GATT, improving its operation and extending its coverage, and the WTO does that, but I think it is fair to describe the WTO as only a modest enhancement of the GATT. It is not a—it is not a watershed change in the structure. What it does is it does give the GATT a legal personality, which it has lacked. It gives it the status of an international institution on a par with other important international agencies. But importantly also, the WTO ties together all of the agreements in a single package and prevents members from playing an a la carte game, from picking and choosing among obligations. And in that respect it does respond to a third point in the legislative mandate, which calls for full participation by developing countries.

A second general point I want to make is that while the WTO achieves the objectives of the 1988 Act, and I think it does it to a very substantial extent, it does so in ways that very carefully balances the increased effectiveness of the new institution with the need to preserve the sovereign prerogatives of the Congress. There has been a lot of discussion on that by earlier witnesses, so I won't go into that, except to say that when we enter any international agreement, we undertake obligations. And just as we expect other parties to observe their obligations, we are expected to and should observe ours.

So I don't think that the—I don't think the sovereignty argument is a substantial problem.

Now, the final point I would make is that there has been a comparison of the WTO with the United Nations, and U.N. agencies.

And I think that that is really based on a misconception. In most instances, the GATT has operated by consensus.

I think that will clearly be the practice in the WTO. Indeed, the WTO says that where consensus cannot be found, then the voting structure comes in. One of the things the WTO does is to improve the voting structure from the point of view of the United States, removes some of the ambiguities where it talks about majority of votes in most cases, where votes are required they are either by two-thirds or three-fourths votes.

And as Ambassador Kantor made clear, a party that does not vote for a change in rules and obligations is not obligated to assume those new obligations. They risk expulsion from the organization if they do not accept the new obligations, but I don't think that that is a realistic concern for the United States.

Now in short, Mr. Chairman, I believe that the WTO is an advantage for the United States. It is only a modest improvement over the GATT, but it is very much in our interest and consistent with the legislative mandate that U.S. negotiators have operated under.

Thank you.

Acting Chairman GIBBONS. Thank you very much.

Newt, why don't you go first?

Mr. GINGRICH. I just have a couple very brief comments.

First of all, I couldn't help but reflect sitting here, and I feel very honored to be here, thinking back, Mr. Chairman, to your trip to Normandy, and the fact that with my good friend, Mr. Frenzel, and with Ambassador Katz, we are really into our third generation starting with Cordell Hull of trying to defend and expand the world market. And it really is an extraordinarily historic achievement.

I couldn't help, particularly listening to Ambassador Katz, just thinking about the scale of what we tried to accomplish. Second, I have a very specific complaint with Mr. Frenzel. He said "NAFTA was for show, this is for dough."

I want the record to show that when he said to me I had to get 130 votes, he at no point suggested that the NAFTA was for show. At the time he said this is the most important international trade vote of your career, don't blow it.

And third, I hope you could sense from the conversation and the tenor today with Ambassador Kantor and with the panel, we are trying to find—even those of us who have serious questions—are trying to find a way to get to a language which monitors the evolution of this WTO and which at the same time, enables the U.S. Congress to retain its legitimate authority and its legitimate oversight. In that way, we are facilitating the growth of the world market, because nothing could be worse than to have the WTO somehow drift off and become a UNESCO.

I am not arguing it will or won't, but as a historian I have worries about patterns within constitutional frameworks. And it is clearly for itself a constitutional framework for its organization. I would very much appreciate any thoughts over the next week or so that you two might have as you reflect on today's testimony about what you would attempt to write into the language, what you would attempt to get stated in the record, to facilitate looking at this as a 30 to 50 year decision.

I mean, I expect many people long after us to be dealing with this. And so I just want to lock in the procedural oversights, the procedural relationships that allow us to have a useful process of continuing to build a larger world market, which I think is the goal that certainly the four of us share.

I very much appreciated two of you being patient today. I know it has been a long hearing, but I think it has been very useful. I appreciate very much, again, Mr. Chairman, being allowed by the august and all-powerful Ways and Means Committee to come and sit up here. [Laughter].

It has been a great honor. Thank you very much.

Mr. FRENZEL. Mr. Chairman, if I may comment, I will tell the gentleman that he achieved a seat in 1 day that took me 9 years on the committee.

Acting Chairman GIBBONS. Yes, but you used to get to vote, Bill, for whatever that is worth.

Mr. KATZ. Mr. Chairman, let me say to Mr. Gingrich, I think that the oversight provisions and protections that you have discussed are very legitimate and I would be glad to help in any way that I can with respect to those.

Acting Chairman GIBBONS. I think they are really legitimate, too. They will try to work that in there. And please keep in touch with us on that, let us make sure we do get it done. Thank you very much. With that final observation, the meeting is adjourned. Thank you very much.

[Whereupon, at 2:47 p.m., the hearing was adjourned.]

[Submissions for the record follow:]

TESTIMONY OF JANE DANOWITZ, EXECUTIVE DIRECTOR
CITIZENS TRADE CAMPAIGN
COMMITTEE ON WAYS AND MEANS
U.S. HOUSE OF REPRESENTATIVES
JUNE 10, 1994

The Citizen Trade Campaign (CTC), a unique and respected national coalition of environmental, labor, consumer, family farm and religious organizations representing 45 million men and women in 50 states, is pleased to submit this testimony on the proposed World Trade Organization (WTO).

CTC is waging a national campaign to postpone Congressional consideration of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) until the Congress and the electorate have had adequate opportunity to fully examine the impact of the agreement, and the WTO on U.S. laws -- federal, state, and local.

We do not believe our concern regarding the WTO -- and its impact on critical environmental and consumer safeguards -- is an overreaction. In fact, it has already become a reality.

The Marine Mammal Protection Act, which ensures that imported tuna is caught in a manner that is "dolphin safe" was recently declared illegal by a GATT panel. The Washington Post reported earlier this month that corporate average fuel economy, so called "CAFE" standards -- the cornerstone of U.S. clean air safeguards -- are about to be chiseled away by our GATT trading partners because manufacturers of luxury foreign cars like Mercedes Benz do not believe that the United States has the right to impose taxes on cars that dramatically increase greenhouse gas emissions.

The European Commission Report on U.S. Barriers to Trade and Investment said in its recently released report:

> "The persisting unilateral elements in U.S. Trade legislation have continued to be of major concern to the European Union (EU) . . . No other major trading partner of the EU has similar trade legislation. The comprehensive multilateral dispute settlement mechanism which has been agreed upon in the framework of the new world trade organization will restrain the Contracting Parties from further having to resort to unilateral determinations in trade disputes, and will oblige them to bring their domestic legislation in conformity with all of the Uruguay Round agreements."

Read through the European Commission Report and you will find cited as "objectionable" such U.S laws as the Cuban Democracy Act, Exon Florio, "Buy American" programs as well as countless state laws that protect consumers and the environment, such as California's "Proposition 65" which requires a warning label on all products containing substances know to cause birth defects or reproductive harm, including lead, bans on dangerous pesticide residues, and laws encouraging recycling.

Finally, in light of numerous complaints about Section 301 -- how can the U.S. Trade Representative seriously claim that the United States can still use trade sanctions to open new markets?

CTC agrees with the U.S. Trade Representative's position that if U.S. laws are challenged by the WTO, the United States can maintain its laws so long as it pays trade sanctions.

However, the U.S. Trade Representative also contends that this in no way infringes upon United States sovereignty.

We strongly disagree. Our position -- and, we believe, the position of the majority of U.S. voters is that U.S. sovereignty is not preserved when a another country can dictate to the United States that we must pay a trade penalty in order to retain a our own laws.

The United States should not have to pay a price to preserve its laws.

From our perspective, the General Agreement on Tariffs and Trade is a modern day "Trojan Horse." The U.S. Trade Representatives rush to ratify this agreement -- an agreement which is set to take effect more than a year from now -- is an attempt to sneak through the Congress a 22,000 page agreement before anyone really knows what's in it.

It's an attempt to rush to ratify U.S. membership in a new UN-type international organization -- an organization which lacks the procedural safeguards of a Security Council or weighted voting of the International Monetary Foundation.

It is an attempt to rush to ratify United States participation in a new world organization which operates in secret -- behind closed doors -- without any process of accountability to the effected parties, the Congress, the states whose laws are at risk or the voters.

We believe that a country that prides itself on openness and due process, a country whose judicial, legislative and executive branches must operate -- except under very limited circumstances -- in an open manner, should not be rushing to ratify an agreement that means our laws will be challenged without due process or representation.

Thank you for your consideration.

Before the
Committee on Ways and Means
U. S. House of Representatives
Washington, D. C.
June 17, 1994

TESTIMONY ON THE WORLD TRADE ORGANIZATION
BY
DR. HERMAN STAROBIN, RESEARCH DIRECTOR,
INTERNATIONAL LADIES' GARMENT WORKERS' UNION

I appreciate the opportunity to submit testimony on the World Trade Organization, which would replace the General Agreement on Tariffs and Trade, in behalf of the International Ladies' Garment Workers' Union and our 175,000 members. Although it is tempting to discuss the Uruguay Round as a whole, as some witnesses did at your June 10, 1994 hearing, I shall confine my comments to the subject of the hearing, namely the WTO.

Having had the opportunity to review the testimony of witnesses before this Committee, both oral and written, at the June 10 hearing, I shall not repeat the arguments that were made. A reading of the testimonies presented, however, makes it clear that there are severe differences on the meaning and significance of the proposed WTO and how it would operate. These differences were not resolved at the hearing and the WTO remains a matter of controversy. In our view, the WTO represents a real threat to our national sovereignty, which was not the case with the GATT.

On February 16, 1994, I offered testimony to this Committee's Subcommittee on Trade on how my organization views the decisions of the Uruguay Round, including the WTO. My comments were based on an analysis of the Round as an advisor to our negotiators throughout the course of the Uruguay Round negotiations. In this capacity, I was present in Geneva during the last ten days of the negotiations and had the opportunity to discuss the Round and, specifically, the WTO with knowledgeable people who participated in the negotiations. For the convenience of the Committee, I have attached that

testimony to this statement.

The conclusions on the WTO that I expressed in February were not changed by some of the testimony in support of the WTO presented at the June 10 hearing. Nor has the debate that has taken place on the WTO changed my views on either how the WTO would function and what I believe to be its threat to our nation's sovereignty.

Referring to both the WTO and its binding dispute settlement mechanisms, I said in my February testimony,

> "Actions against unfair, unreasonable or discriminatory trade and investment practices would require prior WTO authorization by an expert panel. Pending review by a permanent appeals panel, its decision would be binding. This reflects a major change from the current procedures [under the GATT] and has important implications for existing U. S. laws, especially the various forms of Section 301."

On the differences between the WTO and the GATT, I testified to the important changes that had been made in the old GATT system and were now incorporated in the WTO. My comment at the February hearing was that,

> "The Uruguay Round agreement differs from previous trade agreements in that the WTO addresses governmental actions that had previously been considered purely domestic.... [The WTO] may inhibit existing domestic laws related to consumer and environmental protection and prevent strengthening of such laws. The expanded coverage by WTO could be used to severely limit remedies by the U. S. for practices not addressed by the Round, including worker rights and labor standards."

Finally, I urged that, before the Committee voted on the agreement,

it

> "explore possible limitations on U. S. sovereignty as a result of WTO provisions as the Congressional Research Service did after a similar proposal was made in the Dunkel Report in 1991. It will be recalled that in 1947 the Congress rejected a proposal for an International Trade Organization on the ground that it represented a threat to our nation's sovereignty."

In the light of the current debate on WTO, I would add a few additional comments.

With each of the WTO members having one vote, the U. S. could be easily outvoted in a dispute by developing countries, which would represent as much as four-fifths of anticipated WTO members.

In theory, the U. S. could reject a finding by the WTO dispute settlement mechanism that it disapproved of and pay compensation. In practice, however, it is doubtful that the U. S. would reject such a finding, but would go along with the ruling. This would require a change in U. S. laws, whether federal, state or local.

Refusal to accept a WTO ruling would be a rarity, regardless of its implications. This is underlined by the fact that, in its overwhelming desire for a successful conclusion of the Uruguay Round, the Administration enthusiastically bartered away the domestic apparel and textile industries in exchange for which, despite an alleged quid pro quo, we received nothing in return. I have detailed this in my February 16 testimony.

Since the Administration views the Uruguay Round as it did the North American Free Trade Agreement as a way of creating good jobs through increased trade, there is every reason to believe that it would accept any WTO ruling. Wild projections on the benefits to

the U. S. economy that could be expected from the seven prior GATT rounds have been made by prior Administrations and have turned out to be very wide of the mark.

The projections on the positive effects of the Uruguay Round, used to justify the WTO, do not hold up under scrutiny any more than the data presented to justify NAFTA. This Committee should look into the distortion of data, which is becoming more and more prevalent as part of the efforts to win support for trade policies. These policies have, in fact, been destructive of job creation and have played a major role in the lowering of living standards in our country.

Mr. Chairman and Members of the Committee: despite the testimony of Ambassador Kantor at your hearing, the concerns about the WTO remain as strong as they had been. Before voting on the Uruguay Round and its WTO provisions, the Committee should take whatever time is necessary to resolve the question of whether the WTO represents a threat to our nation's sovereignty. There is too much at stake. This Committee should not allow itself to be pressured into voting on the WTO before this question is sufficiently explored.

Nor should this Committee permit itself to be pushed into precipitously voting on an agreement as complex as the Uruguay Round. The WTO chapter runs to only 14 pages, but has stirred up enormous differences about what it means. The overall Uruguay Round agreement comes to more than 3,000 pages, the equivalent of ten volumes. The tariff section of the agreement is another 18,000 plus pages or sixty volumes. It is doubtful that many Members of the Congress have read, let alone digested and fully understood, the implications of this massive document.

STATEMENT SUBMITTED TO THE COMMITTEE ON WAYS AND MEANS U.S. HOUSE OF REPRESENTATIVES, OUTLINING THE WORLD TRADE ORGANIZATION'S SUBSTANTIAL IMPACT ON STATE AUTHORITY

Mr. Chairman and Members of the Committee, this statement is submitted on behalf of the Multistate Tax Commission (MTC), an interstate compact agency that works to ensure that multistate and multinational businesses pay a fair share -- no more and no less -- of taxes to the state and localities in which they operate. The MTC, representing 38 state governments, encourages states to adopt uniform tax laws and regulations in the interest of tax fairness.

This hearing affords us an important opportunity to outline how the new General Agreement on Tariffs and Trade (GATT) will give the World Trade Organization (WTO) significant power over state and local tax policy. Our analysis, and experience, reveals that provisions included in GATT will undermine state and local fiscal sovereignty and likely favor foreign businesses over U.S. citizens and businesses.

Our perspective is that of administrators of tax laws enacted by state legislatures. Most of our members are responsible to governors, who are among the strongest proponents of increased international trade. Therefore, we have no objections to those provisions of the GATT designed to encourage trade by opening up foreign markets to American goods and services. However, the WTO provisions applicable to state and local taxes exceed legitimate trade concerns. They are likely to have unintended, but significant, consequences for state sovereignty and federalism. We strongly support equal treatment of all taxpayers-- foreign and domestic.

The central problem is in the dispute settlement mechanism of the GATT and WTO. WTO dispute settlement panels are not bound by U.S. constitutional standards and jurisprudence in evaluating challenges to state tax laws, even though the Interstate and Foreign Commerce Clauses of the Constitution effectively prohibit discrimination against foreign entities. Our fear, based on our experience, is that such panels may well overturn state and local tax laws which are not in fact discriminatory and which are perfectly legitimate under the U.S. Constitution.

This is precisely what happened in the one international trade case involving state taxation -- *Beer II*. There, a trade panel ruled that a Minnesota law granting preferential tax status to small breweries regardless of where they were located violated the GATT. It held that the small brewer preference must be removed or that equally preferential rates must be accorded large Canadian brewers. There was no evidence of discrimination based on national origin, and there was no evidence of any trade barrier. USTR did not veto or reject this decision. Instead, it has encouraged states to

comply with it.

Moreover, unless some action is taken to the contrary, WTO panel rulings can be enforced against a state or local government in the U.S. court system, even though the law or policy is otherwise consistent with U.S. constitutional standards. While this is not possible with federal measures under WTO, it would be true for state and local laws. With the Congressional adoption of the GATT, dispute panel findings, unless specifically rejected by the U.S. government, can be argued to represent the foreign policy of the U.S. Thus, state and local laws to the contrary would be found to violate the Foreign Commerce Clause of the U.S. Constitution.

In short, the GATT process provides foreign interests with willing government partners another avenue to challenge state and local tax policies with which they disagree. These challenges will occur in a forum not bound by the U.S. constitutional standards and in a forum where states and localities cannot represent themselves. The net result is to place U.S. taxpayers at an unfair disadvantage, compromise state tax sovereignty, and substitute the WTO for the U.S. Supreme Court as the final arbiter of state and local tax policies for foreign multinationals.

There are at least two ways to address these concerns without rejecting the GATT. First, the U.S. government could assert a broad reservation for state and local tax laws that meet U.S. constitutional standards from the national treatment requirements of the GATT. We have proposed several ways of achieving this to the USTR staff, all of which have been rejected as overly broad or unworkable.

The other approach is to include provisions supporting fiscal federalism in the GATT implementing legislation. We believe that effective protections can build on, but must go beyond, those contained in NAFTA. It should include, among other items:

- Rejecting all WTO panel decisions not based on U.S. constitutional standards regarding nondiscrimination against foreign parties and not adopted by an action of the U.S. Congress within 120 days of the panel decision;

- Requiring clear and specific approval by Congress of any other determinations that a state or local law is inconsistant with GATT;

- Federal acceptance of WTO panel decisions affecting states would sunset at definite times and would be subject to periodic renewal;

- Requiring that a state or local law or policy may be declared invalid as being in violation of the GATT only 1) by clear and specific concurrence by Congress and 2) through an action brought by the U.S. government for that purpose;

- Prohibiting (a) retroactive application of WTO panel decisions; (b) use of panel findings and decisions as competent evidence in the U.S. courts; and (c) any private right of action emanating from a WTO panel decision;

- Requiring that affected state and local governments participate in representing their interests before the WTO; and

- Requiring that USTR provide notice to state and local governments within a specific time frame before USTR initiates or responds to a complaint about state or local tax policies and practices.

For over 200 years, the U.S. Constitution has balanced the interests of federalism and free trade. That balance can be accomplished in the GATT only with the types of reservations and implementing legislation we have outlined above. Your leadership in preserving this balance is sorely needed. I look forward to working with you and the other members of the Committee on these issues during consideration of the GATT implementing legislation.

I have attached an article, a memo and a report done by the Multistate Tax Commission and Federation of Tax Administrators all on this issue which I would also like included in the record.

Multistate Tax Commission

Preserving the Role of Congress in Protecting Federalism

Why USTR Should Not Be Allowed to Preempt State Laws under GATT without Clear and Specific Congressional Authority

June 16, 1994

If GATT is ratified without requiring Congressional approval of specific preemptions of state law, the executive branch will secure the discretionary authority to sue states, ***without specific congressional authorization or even a WTO panel decision***, to block state laws (or legislation about to become law) USTR does not like because that agency judges those laws to be inconsistent with GATT. Beyond the obviously outrageous idea that USTR would become a "watch dog" seeking to keep state legislatures and governors from straying beyond boundaries USTR sets, ***their proposal can have adverse and even devastating consequences for state and local governments and U.S. taxpayers.*** This problem can be readily solved by requiring in strong provisions in the GATT implementing legislation to protect federalism, including a provision that there be no preemption of state and local laws without clear and specific authorization of Congress. These are the key points concerning the problem and the solution:

- Just as Treasury triggered the *Barclays* case and associated litigation that has placed California at risk for multi-billion dollar tax refunds, USTR will be able to endanger the fiscal stability of the states in a semi-automatic manner. All USTR needs to do to trigger private legal actions against states is issue policy statements declaring state laws to be inconsistent with GATT. Those statements will provide a strong basis for lawsuits by foreign companies alleging a violation of the foreign commerce clause—lawsuits that can cost state and local governments and ordinary taxpayers huge sums in tax refunds to foreign multinationals and to other select, large businesses that "piggyback" on the foreign company claims.

- Even if California prevails in the *Barclays* case, it will be the result of unique factors in the history of the issue involved in that case—factors that will not be present in GATT-based cases.

Headquarters Office
444 North Capitol Street, N W
Suite 425
Washington, D C 20001-1538
Telephone (202) 624-8699
Fax (202) 624-8819

New York Office
25 W 43rd Street, Suite 218
New York, NY 10036-7406
Telephone (212) 575-1820
Fax (212) 768-3890

Chicago Office
221 N LaSalle Street, Suite 1906
Chicago, IL 60601-1406
Telephone (312) 263-3232
Fax (312) 263-3441

Houston Audit Office
15835 Park Ten Place, Suite 104
Houston, TX 77084-5131
Telephone (713) 4922260
Fax (713) 492-0335

- Only foreign companies can benefit directly from the discretionary power USTR seeks. The power cannot be exercised directly on behalf of U.S. businesses. Thus, foreign multinationals, with the assistance of their governments, will lobby USTR to declare state laws in violation of GATT so that these companies can seek tax reductions or other economic advantages through the court system.

- State and local laws, but not federal laws, are targets for the discretionary enforcement powers sought by USTR. Congress retains final decision-making power over federal laws alleged to be in violation of GATT, so federal laws are exempt from USTR enforcement. Hence, state and local laws will be more available as bargaining chips—and more vulnerable—than federal laws as USTR makes trade-offs and deals in the pressures and counterpressures of international trade conflicts!

- The net result will be unpredictable litigation that will seek to benefit foreign businesses at the expense of most U.S. businesses and ordinary taxpayers and will place state and local governments at substantial financial risk. The power USTR seeks is so potentially devastating that it could end federalism as we know it.

- The solution is to provide state and local laws with protection equal to that provided federal laws: state or local laws should not be preempted by executive statements or action alone, but only when Congress clearly and specifically concurs in the preemption.

Barclays: Preemption of State Laws by Executive Press Releases

The model for federal preemption of state laws through executive branch policy statements prompted by foreign multinationals was created in the *Barclays* case. That case began with foreign multinational lobbying of an executive agency (Treasury). The foreign lobbying produced federal policy statements declaring California's tax law to be contrary to U.S. policy. Those federal executive statements triggered the filing of the *Barclays* case and associated litigation that could, if it goes badly for California, cost that state several billion dollars. A key legal point involved in these types of cases is the question of who exercises the "one voice" of the federal government in foreign affairs—an executive agency alone, or an executive agency acting with the clear concurrence of Congress? *If the "one voice" is owned by the executive branch alone, that voice becomes a wild card in foreign*

commerce cases—a card that will be played unpredictably as Administrations change or the balance of power in trade politics shifts.

The *Barclays* case is still pending, and California could win—but a victory for California in this case should not be intepreted as diminishing the concern over GATT. If California prevails, they will likely prevail because the U.S. Senate, in the seventies, defeated the U.K. tax treaty that would have prohibited worldwide unitary and because the Clinton Administration modified the previous federal policy statements against unitary. Of course, with GATT the states would confront an ***approved*** international agreement instead of a ***disapproved*** tax treaty. Further, there are no guarantees as to how future administrations will view such issues. The lesson from *Barclays* is that, unless restrained by Congress, executive policy statements can trigger multi-billion dollar lawsuits against state taxes—lawsuits that in the context of GATT states will most likely lose.

USTR's Enforcement Powers Directly Benefit Only Foreign Companies

If USTR targets a state for violating GATT, they will be accusing a state of treating a foreign business incorrectly under the national treatment or most favored nation provisions of the agreement. ***No U.S. business qualifies as a direct beneficiary of USTR enforcement action.*** Thus, the cycle of enforcement will begin when a foreign multinational lobbies (with the assistance of their "home" government) USTR to issue a negative policy statement against a state or local law the multinational does not like. Those same firm or firms will then be prepared to launch the litigation once their lobbyists secure the necessary statements.

As the litigation proceeds, there will also be efforts by some U.S. businesses large enough to finance the litigation to "piggyback" their own "equal treatment" cases onto the cases filed by the foreign multinationals. For example, Nebraska experienced a meltdown of their property tax system and had to rewrite their property tax laws, including those involving property tax exemptions to farmers. The Nebraska meltdown began with cases in federal court under the "4-R Act" that granted a tax break to railroads based on agricultural property exemptions, and then multiplied and ricocheted through a series of "equal treatment" state cases that extended the same breaks to other taxpayers.

The process of piggybacking cases onto the lawsuits filed by foreign businesses does not, by any means, make the process any more fair or equitable. Those U.S. businesses who file piggyback cases are likely to be relatively few in total number, but large in terms of the total tax refunds they would seek. These piggypack cases will increase, in an even more unpredictable manner, the financial risk for state and local governments and their ordinary taxpayers.

Some might argue that the GATT national treatment and most favored nation provisions only attempt to "level the playing field," but that argument simply is not credible in light of the one GATT case involving state and local tax and regulatory laws: *Beer II*. For example, in *Beer II* the GATT panel ruled against the Minnesota law that gave equal tax treatment to microbreweries located anywhere in the world. Yet, because of that ruling, large Canadian brewers may secure economic benefits that will not be available to large U.S. brewers. GATT provisions, as compared to U.S. standards of equal treatment in taxation, are loose, ambiguous and subject to great abuse. GATT provisions do not guarantee a level playing field between foreign companies and their U.S. competitors, but instead provide a means, as was illustrated in *Beer II*, for foreign companies to secure economic advantages unavailable to their U.S. competitors.

With regard to future disputes about the internal laws of the nations, GATT does not establish careful and definitive standards of equity. Instead, it provides very broad statements that function as a platform for companies from one nation to launch international political and economic pressure against another nation. With regard to state and local laws, GATT provides foreign companies, and foreign companies alone, the basis for launching challenges to those laws. A process of bargaining, pressure and counterpressure will ensue whenever these challenges occur. Ultimately, the balance of power in trade conflicts and the terms of engagement will determine the outcome of challenges to internal laws based on GATT.

USTR's Proposed Rules Stack the Deck Against the States

Armed with the "one voice" of the federal government on state and local issues under GATT, ***USTR will be able to bargain away state and local laws, but not federal laws, without congressional approval.*** In negotiations with other nations where the U.S. is seeking changes in their practices, and those nations are seeking changes in ours, USTR will be able

to offer concessions with respect to state and local laws that they cannot offer with respect to federal laws.

Under USTR's proposals, the balance of power and terms of engagement in international trade conflicts will be tilted against states and in favor of the federal government. If another nation complains, formally or informally, about a federal law, USTR will not be able to, at its own discretion, bargain that law away. Congress retains the final decision to decide whether it will change that federal law in response to international pressure.

Such will not be the case with state and local laws. USTR, if granted discretionary executive authority to enforce ***their interpretations*** of GATT on states and localities, will have seized ownership and control of the "one voice" of the federal government on issues involving GATT and state and local laws. Foreign companies and governments will recognize USTR's greater flexibility in bargaining away state and local laws instead of federal laws and so will have an incentive to seek concessions that focus on state and local governments. Bargaining away state and local laws will be made easier because, following the *Barclays* model, USTR will not even have to commit to filing suits against the states or localities. Instead, they merely need to agree to issue a policy statement noting that the state or local law violates GATT. The foreign multinationals will take care of the rest of the work in the courts.[1]

Because these lawsuits will now be constitutional cases (based on the "one voice" standard under the commerce clause) states may be liable for refunds for any open periods under the statute of limitations. Because such litigation would likely proceed for several years, the financial liability for the states will become quite large.

There is no way to exaggerate the overwhelming power of the "one voice" in foreign affairs that USTR is implicitly seeking in the GATT implementing regime. In the context of an approved trade agreement, a federal determination that a state law violates the agreement virtually

---

[1]Of course, if the federal government actually sued a state, that federal suit would also be accompanied by a host of private, foreign commerce lawsuits. Again, if the law involves taxes, the private litigants will be seeking very large refunds from states or localities.

dooms that state law.[2] Moreover, that power can be exercised in unpredictable ways and at the initiative of foreign multinationals who view state and local treasuries as a means of subsidizing their competition with American businesses. ***Consequently, the "one voice power" that USTR is seeking can devastate state and local governments and can bring an end to federalism as we know it.***

Give State and Local Laws the Same Protection as Federal Laws

There may be cases, where in the national interest, a state or local law needs to give way to international trade priorities. But why shouldn't that decision be a truly national decision made by Congress in the same way that such a decision will be made with respect to federal laws? Why should state and local laws alone be left to the discretion of international trade negotiators—a ready bargaining chip—while federal laws are protected by the process of final Congressional approval? ***Why don't state and local laws deserve the same protection as federal laws?***

The general rule of federalism is that only Congress may preempt the states through a clear and specific action.[3] The U.S. Supreme Court views Congress as the guarantor of federalism. This role of Congress should not be eroded or repealed in the arena of international trade negotiations. To do so merely makes state and local laws uniquely vulnerable to becoming cannon fodder in international trade wars.

---

[2]This judgment is based on the extensive experience the MTC and its member state tax agencies have with actual foreign commerce litigation. This is not an opinion based only on a reading of some cases, but a judgment acquired through hard experience and consultation with practicing attorneys involved in tax litigation.

[3]We have focused here on how private litigation can be linked to the actions of USTR under their proposed implementing legislation. However, all who want to safeguard the role of states in our federal system should be outraged at the USTR seeking open-ended authority to sit in judgment on state legislative actions and intervene when something happens they do not like. Having a federal executive agency, which is itself susceptible to pressures that do not reflect the welfare of the entire nation, decide when to meddle in state political processes should be unacceptable without further thought or discussion. USTR's proposal is so extreme that it should be analyzed to see if it potentially violates the provision of the Constitution that guarantees to each state a republican form of government and other substantive guarantees of federalism.

The best way to prevent semi-automatic and potentially devastating preemption through the mechanisms described here is to require *clear and specific congressional concurrence* in a judgment that a state law violates U.S. foreign commerce policy *as a prerequisite for any court interpretation* that such executive branch statements represent the "one voice" of the federal government. This approach would short circuit the cycle of preemption through business lobbying that generates executive policy statements that trigger private litigation based on the foreign commerce clause. This approach would return GATT implementing procedures to the mainstream of constitutional principles on preemption of the states: that federal preemption occurs only when Congress makes a clear and specific statement on the subject of the preemption. This approach should replace the USTR proposals that depart so radically from the standard rules of federalism.

conggatt.doc

AMERICA'S STATE TAX OFFICIALS

FEDERATION OF TAX ADMINISTRATORS Multistate Tax Commission

202-624-5890 444 North Capitol Street, N.W., Washington, D.C. 20001 202-624-8699

SUMMARY OF IMPLEMENTING LEGISLATION SUGGESTIONS FOR GATT

There are at least two ways to address these concerns without rejecting the GATT. First, the U.S. government could assert a broad reservation for state and local tax laws that meet U.S. constitutional standards from the national treatment requirements of the GATT. We have proposed several ways of achieving this to the USTR staff, all of which have been rejected as overly broad or unworkable.

The other approach is to include provisions supporting fiscal federalism in the GATT implementing legislation. We believe that effective protections can build on, but must go beyond, those contained in NAFTA. It should include, among other items:

- Rejecting all WTO panel decisions not based on U.S. constitutional standards regarding nondiscrimination against foreign parties and not adopted by an action of the U.S. Congress within 120 days of the panel decision;

- Federal acceptance of WTO panel decisions affecting states would sunset at definite times and would be subject to periodic renewal.

- Requiring that a state or local law or policy may be declared invalid as being in violation of the GATT only through an action brought by the U.S. government for that purpose;

- Prohibiting (a) retroactive application of WTO panel decisions; (b) use of panel findings and decisions as competent evidence in the U.S. courts; and (c) any private right of action emanating from a WTO panel decision;

- Requiring that affected state and local governments participate in representing their interests before the WTO; and

- Requiring that USTR provide notice to state and local governments within a specific time frame before USTR initiates or responds to a complaint about state or local tax policies and practices.

IMPLEMENTING LEGISLATION FOR GATT/GATS

(May 23, 1994)

The implementing legislation for GATT/GATS should include—

POLICY AND MANAGEMENT OF GATT DISPUTES

- **U.S. Policy Not to Accept Decisions Contrary to Existing Jurisprudence.** It is the policy of the United States not to accept any decision of a Dispute Settlement Body or other authorized trade tribunal (collectively "Trade Tribunals") that is adverse to state law, when that decision conflicts with the established jurisprudence of the United States relative to foreign commerce, *i.e.*, the state law survives analysis under the U.S. Constitution and other applicable Federal law.

- **Procedure to Accept Decisions as Binding on States.** A decision of a Trade Tribunal that is adverse to State law will not be deemed a part of the domestic law of the United States (*i.e.*, binding on the States), unless the decision has been accepted by the adoption of a joint resolution of Congress that is not a part of any other legislation and is enacted within 120 days following the receipt of a recommendation by the President that the decision be accepted. If a decision of a Trade Tribunal is not so accepted, then the decision of the Trade Tribunal will not be deemed a part of the domestic law of the United States (*i.e.*, not binding on the States).

- **Accepted Decisions Subject to Sunset.** The acceptance of a decision of a Trade Panel as the domestic law of the United States will expire on the date specified in the acceptance, or the renewal of acceptance, (we are recommending the fifth anniversary of the acceptance or renewed acceptance) unless on or before such time, the acceptance, or the renewed acceptance, has been renewed, or further renewed, by a duly adopted, joint resolution of Congress that is not a part of any other legislation enacted within 120 days following the receipt of a recommendation by the President that the decision be renewed, or further renewed.

- **Decisions Accepted Prospectively Only.** Any acceptance of a decision of a Trade Panel as the domestic law of the United States will be prospective only; such acceptance will not afford

any basis for retroactive relief to affected parties, including claims of refunds by taxpayers.

- **Declarations of Invalidity Limited to Express Actions Brought by U.S.** No State law, or the application thereof, may be declared invalid as to any person or circumstance because of inconsistency with GATT/GATS except in an action brought by the United States for the purpose of declaring such law or application invalid.

- **No Private Cause of Action.** No person other than the United States shall have any cause of action or defense under GATT/GATS or may challenge under any provision of law, any action or inaction by any department, agency, or other instrumentality of a State on the ground that the action or inaction is inconsistent with GATT/GATS.

- **WTO Agreement and Decisions of Trade Tribunals Not Competent Evidence.** The Agreement establishing the World Trade Organization (the "WTO Agreement"), including the Multilateral Trade Agreements and the Plurilateral Trade Agreements, and the Ministerial Declarations and Decisions and the understanding on Commitments in Financial Services annexed to the WTO Agreement and any other collateral document shall not be competent evidence in any domestic proceeding brought to challenge state law except in an action brought by the United States for the purpose of declaring such law or application invalid. Evidence of the decisions of Trade Tribunals adverse to state law may not be admissible in any proceeding challenging state law without the United States Congress affirmatively adopting the decision as the Supreme Law of the United States that is binding upon the States.

- **State Representation Before Trade Tribunals.** In that portion of any proceeding of a Trade Tribunal that pertains to the resolution of a Member country's assertion that State or local law is inconsistent with the obligations of the United States under GATT/GATS, the United States will designate as its representative the representative designated by the affected State or States, with the affected States (if there are more than one) determining among themselves who of the designated representatives shall be the lead representative.

- **State Representation in Membership of Trade Tribunals Reviewing State or Local Law.** In any proceeding of a Trade Tribunal that pertains to the resolution of a Member country's assertion that State or local law is inconsistent with the obligations of the United States under GATT/GATS, the membership of the Trade Tribunal will include at least one representative of a State of the United States.

- **Policy of United States to Accept Qualified Nominees for Service Upon Trade Tribunals.** It is the policy of the United States to accept as qualified nominees for service on Trade Tribunals whose proceeding pertain to the determination of the possible failure of the United States to fulfill its commitment under GATT/GATS because of State or local tax law only those nominees who are tax officials or designees of sub-central units of governments from nations having a federal system of government.

- **Notice to the States of Consultations or Proceedings Involving State Law.** The United States will give at least 180 days prior written notice to all States before (i) responding to a complaint that State or local law is inconsistent with the obligations of the United States under GATT/GATS or (ii) initiating consultation with another nation that the law of a sub-central government is inconsistent with the obligations of the government of which the sub-central government is a part.

PRESERVATION OF FEDERALISM IN CONTEXT OF EXPANDING INTERNATIONAL TRADE

- **Federal-State Consultation.** The United States will consult with the States by—

  - **Biennial International Conference on Federalism and International Trade Agreements.** The United States Trade Representative, in conjunction with the World Trade Organization and the members of the General Agreement on Tariffs and Trade having federal systems of government, convening and facilitating at least once every two years an international conference to discuss issues of the operation of federal systems of government in relation to international trade agreements. (The conference shall involve representatives of national and sub-central governments of nations having federal systems of government, including organizations of sub-central governments.)

  - **Annual National Conference on Federalism and International Trade Agreements.** The United States Trade Representative, in conjunction with the Advisory Commission of Intergovernmental Relations, convening at least once each year a national conference to discuss issues of the operation of the U.S. system of federalism in relation to international trade agreements. (The conference shall involve interested federal agencies and officials, interested state and local officials, and national and interstate organizations of state and local governments and officials. The United State Trade Representative shall, within six months of the close of each such annual conference, issue a report to Congress on the status of issues involving U.S. federalism in relation to international trade agreements.)

  - **Advisory Committees.** Using the intergovernmental policy advisory committees on trade to encourage conformity of State law with practices of GATT/GATS, (membership of the committees to include State organizations whose purposes and programs seek to achieve increased uniformity of State laws with respect to multijurisdictional commerce).

Formalized Consulting Process. Establishing within the Office of the U.S. Trade Representative a Federal-State consulting process for addressing issues relating to GATT/GATS, including procedures under which (not inconsistent with the other requirements established by the implementing legislation)

- ✓ State laws that are grandfathered can be identified;
- ✓ States are informed on a continuing basis of matters impacting the States;
- ✓ States are provided a meaningful opportunity to inform and advise the U.S. Trade Representative on matters impacting the States;
- ✓ The U.S. Trade Representative takes into account the information and advice received from the States; and
- ✓ States are given the greatest practical opportunity to be involved in developing the positions of the United States on matters impacting the States that are addressed by committees, subcommittees, working groups, councils, the WTO, or the dispute settlement processes.

GATT rulings should not be more binding on the states than they are on the federal government.

It's 2004, and the U.S. economy is booming. Despite the boom, states are cutting services and raising taxes. Some cities and school districts are near bankruptcy. Citizens are outraged. They understand cuts and tax increases when times are tough, but not when state coffers should be full with receipts from a growing economy.

Citizens are doubly outraged because the belt-tightening and tax increases are intended to pay the bill for tax breaks given to foreign corporations and investors. What is going on here?

Dan R. Bucks is executive director of the Multistate Tax Commission, but the views expressed here are his own.

A peek into the future

The trouble began in 1996 and continued through 1999 when international trade panels — operating under the authority of the World Trade Organization that was established in the 1993 version of GATT — issued a startling series of rulings against state and local tax laws. The panels ruled against state and local tax practices that the U.S. Supreme Court previously found to be acceptable — in their words "nondiscriminatory" — with respect to foreign commerce. The rulings were developed through private proceedings conducted by foreign officials — proceedings at which no state or local officials were allowed to defend the laws in dispute.

The flood of rulings against states began with a trickle and soon became a torrent, sweeping away broad sections of established tax laws.

1996 — In this year, a trade panel of British, Venezuelan and South Korean officials told Kentucky and other states to give Japanese banks a capital stock tax deduction for Japanese government bonds because Congress requires that states

The federal government needs to protect states' rights under new international trade agreements, or states and their citizens could face a rude surprise.

Copyright 1994 The Council of State Governments Reprinted with permission from State Government News

give U.S. banks a deduction from capital stock taxes for U.S. bonds.

1997 — Another trade panel heard a complaint from Japanese telecommunications service companies. This panel ruled against Texas, Nebraska and Iowa for calculating taxable corporate income solely on the basis of sales instead of also considering those corporations' investments and jobs in the states. The panel declared this "single sales factor formula" a restraint on trade because it favored firms in Texas, Nebraska and Iowa over Japanese businesses. The GATT panel asked these states to cease applying this formula to foreign companies selling in their markets.

Later that year another trade panel, in a case prompted by Canadian trucking firms, ruled that all states granting property tax exemptions to agricultural equipment and business inventories must grant similar exemptions to the trucking firms and all other foreign businesses selling services into the United States.

Also in 1997, sales and use tax exemptions came under fire. A British firm owning a chain of U.S. restaurants challenged the food tax exemptions in some states. Those exemptions typically apply to groceries, while prepared food is usually taxed. A trade panel ruled this practice discriminatory and asked states to grant an exemption for food served in restaurants owned by foreign companies. Other sales and use tax exemptions were successfully challenged by other foreign firms in a subsequent series of cases.

1998 — In a case initiated by the United Kingdom at the behest of Barclay's Bank, a panel of Brazilian, French and Japanese officials granted what amounted to a full exemption for foreign corporations from the corporate income taxes of most states. The panel ruled that those states allowing some companies and corporations to "pass-through" income, tax-free from the business to the owners, who then pay the taxes, must grant the same treatment to all foreign corporations operating in those states. The owners of foreign companies are generally foreign citizens who are not subject to state laws, so the income earned by foreign corporations became exempt in most states.

1999 — The most shocking ruling came out this year. The Japanese government charged that California was discriminating against Japanese banks because the overall level of taxes in California was higher than those applied to German and U.S. banks operating in South Carolina. Using the "least restrictive measure" standard employed by a GATT panel in the *Beer II* decision in 1992, the panel in this case reasoned that Japanese firms were being discriminated against because the higher California taxes were a "more restrictive measure" than the South Carolina tax es. California, the panel ruled, needed to lower its overall tax level to that of South Carolina's if the United States were to avoid onerous trade sanctions. In the ruling, the panel also rejected the reasoning of a letter the GATT Secretariat sent to the U.S. government in 1994 giving assurances that one state's tax laws would not be compared with another.

Foreign corporations filed suit in the United States seeking to mandate these rulings. Although GATT panel rulings are not legally binding on the United States, the foreign corporations argued that they are binding on the states, under the Foreign Commerce and National Supremacy Clauses, because GATT represents the foreign policy of the United States. The U.S. government could have rejected the GATT panel rulings in the 1996-1999 per-

1997 — A British firm owning a chain of U.S. restaurants challenged the food tax exemption in some states. Those exemptions typically apply to groceries, while prepared food is usually taxed.

iod, but did not do so because the U.S. economy was in recession, and other nations threatened severe trade sanctions against the United States if the panel rulings were rejected. Faced with a choice between jobs and federalism, the U.S. government chose jobs.

Absent rejection by the U.S. government, foreign interests argued in the court cases that the GATT rulings constituted U.S. policy. The various cases were consolidated, and in the spring of 2003, the U.S. Supreme Court, ruling in *GATT Nations' Corporations vs. Alabama, et al*, agreed with the foreign parties and mandated implementation of the GATT rulings as the law of the land.

U.S. businesses that had not previously benefited from the GATT rulings quickly filed their own lawsuits seeking the same treatment as foreign corporations under the Equal Protection Clause of the U.S. Constitution and various state constitutional provisions mandating equal and uniform treatment. Early court rulings favored the claims of the U.S. businesses. By early 2004, the entire body of state and local sales and use taxes, corporate franchise and income, and property taxes was in shambles, and state legislatures convened that year in the midst of the worst state and local fiscal crisis in U.S. history.

Back to 1994

Is this doomsday scenario exaggerated? Yes, a bit. However, none of these events can be ruled out because all of the elements are present today in the 1992 GATT panel decision in the *Beer II* case and the newest version of GATT signed in December 1993 at the conclusion of the Uruguay Round of negotiations. The new version of GATT expands the scope of potential problems for state and local taxes. Previously, the main body of GATT dealt with trade in goods and covered only sales and use, excise and other transactional taxes. That remains the case for the goods sector. In addition, a new portion of GATT deals with trade in services, and that portion (labeled GATS) covers — in addition to sales taxes — income, inheritance and property taxes as applied to international service industries.

Can this scenario of future fiscal crisis be avoided without losing the economic benefits that GATT promises in the form of expanded international trade? Yes, but only if the federal administration and Congress take clear and decisive action in the coming months to ensure that federalism and, in particular, state tax sovereignty, is protected. Unless Congress and the administration act to protect federalism, the new version of this trade agreement will, over the long term:

- reduce state and local taxes paid by foreign taxpayers and unfairly shift that tax burden to U.S. businesses and citizens,
- transfer authority to determine state and local tax policy from the states, subject to the review of Congress and the U.S. Supreme Court, to international trade panels with little or no expertise in state and local tax policy or constitutional law relating to federalism, and
- erode the ability of states to perform their role as "laboratories of democracy" in our system of federalism — fashioning local solutions to local problems.

Murky wording hurts

The special rights and privileges that foreign taxpayers will enjoy under GATT, unless adjustments are made, arise from the broad and ambiguous terms used in the agreements and the dispute settlement mechanisms established by the agreements. Specifically, the following features of the agreements create problems for state and local taxation.

- The agreements use broad language that is much less precise than tax law and create the potential for unpredictable, unintended and unfortunate decisions. For example, "unjustified discrimination" is an ill-defined, ambiguous standard in the agreements, and the limited history of GATT authorities applying that standard to state taxation is disturbing.
- Foreign companies seeking to reduce their state or local tax bills would no longer be required to bring an action in the U.S. courts, but could instead recruit their government to lodge a GATT complaint against the state or locality with the World Trade Organization. "Dispute settlement bodies," comprised of representatives of foreign nations with little or no tax or federalism experience, would rule on

1996 — A trade panel told Kentucky and other states to give Japanese banks a capital stock tax deduction.

complaints by foreign nations against a state or local tax practice. These tribunals would not be bound by U.S. court precedents or any other law.

• States have no guaranteed standing before dispute settlement bodies. Absent congressional action, states cannot be assured that their views will be presented or protected by the U.S. government. The federal government may defend the states' legitimate interests — or it may decline to, at its discretion.

• Because GATT, unlike the U.S. Constitution, does not recognize federalism, and more specifically the rights of state governments, which are otherwise constitutionally restricted from discriminating against foreign and interstate commerce, dispute settlement bodies will be under no obligation to balance the claims for trading interests against subnational governmental rights.

These features combine to create opportunities for tax benefits for foreign taxpayers that are more favorable than for U.S. taxpayers. That is what has occurred in the one case involving state taxes that has been subject to a dispute settlement ruling under GATT. This case is commonly referred to as *Beer II* and involved a Canadian-United States dispute over federal and state taxes and regulations affecting beer production and distribution. Because of that case, large Canadian breweries may, unless the ruling is rejected by the United States, ultimately secure economic benefits in the form of special relief from state laws not available to large U.S. breweries under the U.S. Constitution or laws.

How to get tough on GATT

The simplest solution to the problems posed by GATT would be for the U.S. government to file exclusions from GATT for all state and local taxes that conform to the U.S. Constitution or are based on federal law. The U.S. Constitution applies a well-defined body of "free trade law" to the states in the form of the Interstate and Foreign Commerce Clauses. By supporting U.S. constitutional standards, the states and the federal government would be providing strong guarantees to foreign businesses that they will be treated equally as compared to U.S. taxpayers.

The U.S. government was given until April 15 and June 15 to file exclusions under two separate categories of the agreement. At press time in early April, however, the U.S. trade representative's office has declined to do so, saying other nations will ask for too many concessions in exchange for this action to protect federalism.

If the U.S. government does not pursue exclusions based on the Constitution, then this year Congress should enact strong provisions protecting federalism in the implementing legislation for GATT. The legislation should include provisions that require the U.S. government to reject any GATT panel ruling that is inconsistent with established jurisprudence in the United States on the acceptability of state and local laws under the Constitution and federal law. GATT panel rulings adverse to the states should not be accepted by the U.S. government unless both the president and Congress agree on them. GATT rulings should not be more binding on the states than they are on the federal government. Accordingly, GATT rulings should not become the basis for lawsuits against states and localities in the United States, and they should not be introduced in evidence in any court proceedings.

States should be able to defend their laws directly before GATT panels. In cases involving state or local taxes, the United States should accept as members of dispute settlement panels only people with expertise in taxation at subnational levels of government in other nations with federal systems. Further, states should be guaranteed full consultation with federal government officials as trade disputes involving federalism arise. Additional measures beyond these may be necessary.

GATT promises an expansion of international trade, and that promise should be fulfilled — but without undermining American federalism. The U.S. Constitution provides a foundation for our nation based on the principles of free trade and federalism. It has created the most successful free trade area in modern times and establishes the ideal other nations pursue in international trade agreements. The Constitution also establishes a successful system of federalism. In a world where other nations are beset with social tension, and even civil war, over issues of balancing the aspirations of communities with central governments, the U.S. system is a model for balancing local and national interests. That model should be preserved □

GATT promises an expansion of international trade, and that promise should be fulfilled — but without undermining American federalism.

Ensuring that States Treat Foreign Taxpayers Equally Compared to U.S. Taxpayers

Restoring the Balance of Free Trade and Federalism under the GATT and GATS

A Joint Report by the

Multistate Tax Commission
and
Federation of Tax Administrators

February 10, 1994

Preface

The Multistate Tax Commission is an interstate compact agency that works to ensure that multistate and multinational businesses pay a fair share of state and local taxes. Thirty-seven states and the District of Columbia, participate in the Commission.

The Federation of Tax Administrators is the professional association of state tax administrators in the United States, and it works to advance the standards, efficiency and effectiveness of state tax administration. All fifty states, the District of Columbia, and New York City participate in the Federation.

This report was prepared jointly by the Commission and Federation. Principal contributors from the Commission include Paull Mines, Alan Friedman, Jim Rosapepe and Dan Bucks. Principal contributors from the Federation include Mary Jane Egr and Harley Duncan.

Multistate Tax Commission
444 N. Capitol St. NW, Suite 425
Washington, DC 20001

202-624-8699 (phone)
202-624-8819 (fax)

Dan R. Bucks
Executive Director

Federation of Tax Administrators
444 N. Capitol St. NW, Suite 348
Washington, DC 20001

202-624-5890 (phone)
202-624-7888 (fax)

Harley T. Duncan
Executive Director

Ensuring that States Treat Foreign Taxpayers Equally Compared to U.S. Taxpayers

A. Maintaining a Balance between Free Trade and Federalism

The U.S. Constitution established a foundation for our Nation based on the principles of free trade and federalism. It has created the most successful free trade area known in modern times and establishes the ideal pursued by other nations in international trade agreements. The Constitution also establishes a successful system of federalism. In a world where other nations are beset with social tension, and even civil war, over issues of balancing the aspirations of local communities with central governments, the U.S. system is a model for balancing local and national interests.

Over the past two centuries, our Nation has enhanced and developed an effective balance between free trade and federalism—a balance that flourishes today. However, GATT and GATS, which do not recognize principles of federalism and the sovereignty of state governments, threaten to destroy that balance. The proposals made here would restore, in the context of GATT and GATS, a proper balance between free trade and federalism.

These concerns are not small matters, but are of large historical significance and future consequence. Our nation's balance of free trade and federalism was not easily achieved. The U.S. Supreme Court, beginning with *McCullough* v. *Maryland*, has shaped this balance of free trade and federalism through hundreds of decisions involving the rights of states. Congress addresses in countless issues each year the rights and responsibilities of the states. The balance that has been struck over two centuries through both peace and war should not become a casualty of short-term commercial negotiations.

The states have primary responsibility for meeting the domestic needs of the people of our nation. The states and their subdivisions maintain public order. educate future citizens and workers, maintain the essential infrastructure necessary for commerce and public life. and assist persons beset by misfortune or wrong choices to become productive members of society again. They do these tasks and more in a diversity of ways. That diversity is an important value of our federal system. States are laboratories of democracy and are a continuous source of innovation to meet a range of public needs. Endangering state tax sovereignty inevitably imperils the vitality and stability of our society.

Fundamental Principles and Commitments

States are committed and prepared, under the U.S. Constitution, to treat foreign taxpayers as well as they treat U.S. taxpayers who do business within their borders from outside. This commitment forms the foundation for the proposal made here for reconciling federalism with the terms of GATT and GATS.

The commitment extends to those tax matters that are entirely within the control of the states and their local subdivisions. Where states rely on federal law as a base for state taxation, there may be exceptions to the principle of equal treatment, but only to the extent the federal government makes such an exception.

No protection is sought here, in the context of GATT or GATS, for state tax policies and practices found to discriminate against foreign taxpayers under the U.S. Constitution.

Accordingly, this document proposes that Most Favored Nation Exemptions and National Treatment Reservations be filed under GATT and GATS that protect the right of foreign taxpayers to be treated equally by the states under the U.S. Constitution. The exemptions and reservations would exclude from the scope of GATT and GATS any state or local tax approved as non-discriminatory under the U.S. Constitution. Any challenge to a state or local tax practice would first be brought in the state or U.S. court system, and if approved in that system would not be subject to GATT or GATS jurisdiction. The only additional exemption and reservation we seek is, as indicated above, for state or local tax practices that are based on federal law.

GATT and GATS Threat to Federalism—Need for a Substantial Remedy

Taxation is a core element of sovereignty. The U.S. Supreme Court has, as recently as January 24, 1994, in *Oregon* v. *ACF Industries*, cited "principles of federalism" as supporting their approval of Oregon's tax practices in the case. The Court observed that they have recognized the taxation authority of state government as "central to state sovereignty." Both GATT and GATS, as they stand at present, threaten to undermine state tax authority in fundamental ways. Specifically, these international trade agreements create these problems for state and local taxation:

- The agreements use broad language that is much less precise than tax law and create the potential for unpredictable, unintended and unfortunate decisions. For example, "unjustified discrimination" is an ill-defined, ambiguous standard in the agreements, and the limited

history of GATT authorities applying that standard to state taxation is disturbing.

- Foreign companies seeking to reduce their state or local tax bills would no longer be required to bring an action in the domestic courts of the U.S., but they could instead recruit their government to lodge a GATT complaint against the state or locality. "Dispute Settlement Bodies" comprised of private sector persons from other nations who are trade experts, but most likely have little or no tax or federalism experience, would rule on complaints by foreign nations against a state or local tax practice. The Dispute Settlement Bodies would not be bound by U.S. court precedents or any other body of law.

- States have no guaranteed standing before Dispute Settlement Bodies. Absent Congressional action, states cannot be assured that their views will be presented or protected by the U.S. government at any time in the future. The federal government may defend the states' legitimate interests—or it may decline to, at its sole discretion.

- Because GATT and GATS, unlike the U.S. Constitution, do not recognize federalism, and more specifically the rights of state governments, which are otherwise constitutionally restricted from discriminating against foreign and interstate commerce, as a positive value, Dispute Settlement Bodies will be under no obligation to balance the claims of trading interests with subnational governmental rights.

- Although GATT and GATS rulings are not binding on the federal government—the rulings authorize trade retaliation instead of court orders—they will generally bind the states, because states, unlike the federal government, are bound by the national Supremacy and Foreign Commerce Clauses of the Constitution. Thus, foreign parties may seek enforcement of a GATT ruling by bringing suit against a state under the Foreign Commerce Clause.

- Apart from referring to an existing trade case, federal law that is the source of certain state and local taxing practices has significant implications under GATT/GATS. These federally-based practices also illustrate the need to develop appropriate reservations and exemptions that avoid unnecessary disruption of the balance of governmental power that exists between and among the federal government and the states. The practices that are discussed later in this paper involve tax-exemptions for non-profit and U.S. governmental enterprises, protection

afforded by PUB. L. 86-272, and tax exemptions for U.S. and state government securities.

- The recent ruling in *Beer II*, a GATT panel report issued February 7, 1992, on Canada's challenge to federal and state law affecting the beer industry, amply illustrates the threat to federalism posed by trade agreements. *Beer II* ignores the right of states to adopt different, but non-discriminatory, state responses to local conditions—that right is the very essence of federalism! The decision grants unjustified benefits to international brewers by employing an arbitrarily broad notion of discrimination to strike down state laws that do not restrain foreign or interstate commerce. Most disturbingly, the *Beer II* panel elevates the trade agreement above the U.S. Constitution. (*Beer II* is analyzed later in this paper.)

GATT/GATS Rulings Can Bind States, But Not Federal Government

As suggested in the preceding section, GATT and GATS generally will bind the states in ways that do not apply to the federal government. It is important to keep this difference in effect in mind, because the federal government is simply not subject to the many restrictions applicable to the states and the perspective of the federal government is not, therefore, directly transferable to the states.

GATT and GATS are a part of the foreign policy of the United States that, under the Constitution, is binding on the states. U.S. domestic courts entertaining state tax disputes will consider GATT and GATS rulings by the Dispute Settlement Bodies (and the other authorized decision-making agencies of these trade accords) as expressions approved under U.S. foreign policy unless there is a formal rejection of the rulings by the U.S. government. Thus, in any future cases involving state or local taxes in which the U.S. government does not expressly and firmly reject the GATT or GATS ruling, foreign parties will be able to take the trade ruling into U.S. domestic courts and argue persuasively that the state or local tax practice violates the U.S. Constitution by virtue of being inconsistent with the foreign policy of the U.S.

This ability of foreign parties to seek enforcement of GATT or GATS rulings that may be adverse to a state taxing practice in the domestic courts of the U.S. makes the nature of the dispute settlement process of great concern. Trade panels—closed to the states and comprised of non-U.S. citizens—will begin to play a role previously reserved to the U.S. Supreme Court. Trade panels with little or no background in or sensitivity to state or local taxation and constitutional federalism, unbridled by U.S. Supreme Court precedents and constitutional language on the

rights and obligations of subnational governments, but empowered instead to interpret broadly vague language, pose a clear and present danger to the U.S. system of federalism.

The Solution—the U.S. Constitution

The Interstate Commerce Clause, combined with other provisions of the U.S. Constitution, guarantees that states tax out-of-state parties in the same manner as they tax their own state residents. Further, the Foreign Commerce Clause requires that the states tax foreign parties in the same manner as they tax U.S. parties. Both clauses interact to achieve more effectively and precisely than GATT or GATS can guarantee essential equality in taxation for foreign and U.S. interests alike. Further, the case law under these provisions is careful and well-developed and is not subject to the likely abuses under the ambiguous language and incomplete precedents of the trade agreements. Because of the effectiveness of the U.S. Constitution in guaranteeing equal and non-discriminatory taxation, the Constitution should be the basis for achieving the result sought by GATT and GATS: trade that is not restrained by discriminatory taxation.

B. Why the Constitution Works to Protect Foreign Taxpayers

Because foreign companies are well protected by the Unites States Constitution against unlawful discrimination, local economic protectionism and undue burdens placed upon commerce, GATT/GATS should not limit or affect the tax methods by which states or other subnational governments raise revenue from business activities over which they have jurisdiction. During the past 200 years, the United States Supreme Court has consistently safeguarded interstate and foreign commerce from discrimination and undue burdens caused by unlawful state tax measures. Several provisions of the United States Constitution exist to address overreaching by the states when they seek to require interstate and foreign commerce to bear a "fair share" of taxation. Those protections reside in Articles I, §8, cl.3 (Interstate and Foreign Commerce Clauses), §10, cl.2 (Import and Export Clause), VI (Supremacy Clause), and Amendment XIV, §1 (Due Process and Equal Protection Clauses) of the Constitution. This discussion is limited to an examination of the Commerce Clause protections extended by the Constitution which more than amply protects consistent with the standards of GATT and GATS domestic and foreign companies transacting business in foreign commerce.

Under the Foreign Commerce Clause, states and their political subdivisions are only allowed to impose a tax obligation on businesses engaged in foreign commerce when the obligation:

1. is applied to an activity with a substantial nexus with the taxing state;

2. is fairly apportioned;

3. does not discriminate against interstate commerce;

4. is fairly related to the services provided by the taxing state;

5. does not create a substantial risk of international tax multiplication; and

6. does not prevent the Federal Government from speaking with one voice when regulating commercial relations with foreign governments.[1]

Unless each and every requirement listed above is fully met, the tax obligation will fail under the Foreign Commerce Clause and the taxpayer who might have paid the tax will be entitled to meaningful relief. *See McKesson Corp.* v. *Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990).

Since the adoption of the Constitution, the United States Supreme Court and state courts have addressed scores of state tax issues and found many to violate the Interstate and Foreign Commerce Clauses. In the past ten years alone, the Supreme Court has issued several opinions declaring invalid against the Commerce Clause state tax measures that bore on interstate and foreign commerce. Representative examples of but a few of those cases are found in *Westinghouse Elec. Corp.* v. *Tully*, 459 U.S. 1144 (1983); *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984); *New Energy Co. of Indiana* v. *Limbach*, 486 U.S. 269 (1988); *Kraft General Foods, Inc.* v. *Iowa Dept. of Revenue and Finance.* ___ U.S. ___, 112 S.Ct. 2365 (1992). State courts also preserve the free flow of commerce. *See HL Farm Corp.* v. *Self*, 1994 WL 1927 (Tex.).

In the *Westinghouse* case, the Supreme Court struck down a New York tax credit which was calculated based upon the amount of goods that were exported through New York ports, as opposed to other state ports. As one commentator put

---

[1]See *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 446, 451 (1979) (invalidating county property tax on containers used in foreign commerce); and *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977).

it, this preferential New York tax "was relegated to the dust bin of Commerce Clause casualties...".[2]

In *Bacchus*, the Supreme Court invalidated a tax exemption extended to a locally produced alcoholic beverage (a type of beverage sold in small volume that could only be manufactured in Hawaii), but not extended to products coming from beyond the Hawaiian borders. The Court made crystal clear that it would not tolerate this kind of economic protectionism.

The *New Energy* case offers another example of the Court's application of the Commerce Clause to invalidate a geographically based tax preference. The tax provision at issue had an interesting twist in that it provided a tax credit against Ohio sales taxes for ethanol sold in Ohio, unless the source of the ethanol was in a state that did not provide Ohio ethanol sellers with a similar credit. The Court invalidated the Ohio tax provision as discriminatory, finding that the reciprocity feature of the law was intended to give favorable tax treatment to ethanol produced in Ohio.

In the *Kraft* case, the Supreme Court dealt with an Iowa tax system that resulted in dividends received by taxpayers from their foreign subsidiaries being subject to a direct business tax, while dividends received from domestic subsidiaries were permitted to be deducted from the Iowa tax base. The Court held Iowa's discriminatory treatment of foreign dividends a violation of the Foreign Commerce Clause.

The Texas Supreme Court in *HL Farm Corp.* struck down a reduced property tax valuation provision that was restricted to U.S. residents as violative of the state constitution because the restriction was not rationally related to a legitimate state interest. Under the decision, HL Farm, whose majority shareholder was a nonresident alien, was granted an "Open-Space Land" designation which entitled it to a reduced valuation.

While there are several more examples of cases in which the Supreme Court or other courts have held the states in check by invalidating tax impositions, credits, deductions and the like as discriminatory under the Commerce Clause, the recent cases noted above make the point. The United State Supreme Court, as well as all inferior courts which must follow its holdings, are constantly put on watch against any state tax method that might violate the Interstate or Foreign Commerce Clauses. There is no need for any additional safeguard to protect U.S. or foreign trading partners from excessive tax zeal by the states. Without doubt, our

---

[2] Hartman, FEDERAL LIMITATIONS ON STATE AND LOCAL TAXATION, 1992 Supp. at 87

federal system has put in place sufficient checks against states running amok and exceeding the constitutional limitations that protect both domestic and foreign commerce.

To the extent that the Supreme Court has permitted states to impose tax duties on foreign commerce, such taxes (1) have been permitted by the federal government; (2) were consistent with all provisions of the Constitution; (3) resulted in no double taxation; and (4) were reasonable in amount and scope. For example, in *Wardair Canada Inc.* v. *Florida Dept. of Revenue*, 477 U.S. 1 (1986), the Supreme Court upheld, against a Foreign Commerce Clause challenge, a state sales tax on aviation fuel purchased in the state by a foreign-based airline for use in foreign commerce. Under the facts presented, the Court concluded that existing international agreements did not bar such a tax, finding that the federal government, by negative implication, had acquiesced in the state taxation of the fuel used by the foreign carriers.

More recently, in *Itel Containers Int'l Corporation* v. *Huddleston*, ___ U.S. ___, 113 S.Ct. 1095 (1993), the Supreme Court upheld a challenge against a Tennessee sales tax on leases of shipping containers delivered in that state for use exclusively in foreign commerce. The Court found that the Foreign Commerce Clause was satisfied, with all six prongs set out above being met. The first four principles (the test for a violation of the Interstate Commerce Clause under *Complete Auto Transit*) were not contested. The last two principles—risk of multiple taxation and "one voice"—were found satisfied because the tax at issue (1) incorporated a credit for taxes paid to another jurisdiction on the same transaction; and (2) was consistent with existing international agreements.

In short, taxpayers aggressively pursue claims of discrimination or other Commerce Clause and constitutional violations in areas of state taxation of commerce, and the United States Supreme Court has not hesitated to limit the states' taxation of interstate and foreign commerce when appropriate. In the context of foreign commerce, the Court applies a rigorous analysis to the states' taxing systems. Where constitutionally prohibited discrimination against foreign commerce, including local, economic protectionism, where foreign commerce is unreasonably burdened or subjected to a substantial risk of double taxation, or where the federal government has entered into agreements or has clearly evidenced a national policy against a state tax, the state tax cannot survive constitutional scrutiny. In those cases where the state tax survives such scrutiny, it has done so with the federal government's blessing. There is no compelling reason now to delegate to a non-judicial review body that oversight which has been fairly and consistently applied by the United States Supreme Court.

Lessons from Beer II

A GATT panel issued a report on February 7, 1992. on Canada's challenge to federal and state laws affecting the beer industry. (This GATT panel decision is commonly referred to as "*Beer II.*") The *Beer II* decision provides ample evidence that states are justified in fearing decisions that will likely flow from Dispute Settlement Bodies under GATT and GATS. What is upsetting to the states is that *Beer II* ignores federalism entirely and fails to acknowledge the sovereign right of states in a federal system to establish different, but non-discriminatory, laws that reflect local conditions that do not necessarily pertain in all states.

Specifically, there are at least three features of *Beer II* that are unacceptable to the U.S. constitutional framework of federalism. The three troubling features of *Beer II* are the panel's (i) employment of an arbitrarily broad notion of "discrimination;" (ii) application of the "least restrictive measure" standard to define the GATT obligation of "national treatment;" and (iii) elevation of GATT above the U.S. Constitution.

Overly Broad Concept of Discrimination: The *Beer II* panel ruled against certain state tax laws that do not discriminate against either interstate or foreign commerce. In particular, Minnesota offers favorable excise tax treatment for microbrewery production that is conditioned only on the size of the brewery and is completely neutral with respect to the national origin or location of the brewery, its product or its inputs. No microbrewery located in Canada is denied access to the favorable tax treatment. (The Minnesota law is distinguishable from some of the other state laws considered in *Beer II* that condition favorable tax treatment on geographic location.) Yet, the *Beer II* panel was unwilling to make that distinction. Employing a "beer is beer" standard, the panel swept the Minnesota-type laws into the scope of its disapproval. Under "beer is beer" reasoning, no government would ever be able to make reasonable or rational distinctions between beer produced under different circumstances unrelated to geographic location. The beer is beer standard negates the ability of states to make rational policy choices where there is no evidence of an intent to discriminate against foreign or interstate commerce or to promote local, economic protectionism.

Classifying taxpayers on the basis of size is a common and acceptable practice that generally poses no problems of discrimination against commerce flowing across political boundaries (*e.g.*, in federal law, S Corporations which may not have non-resident alien shareholders can be distinguished from C Corporations on the basis of number of shareholders). Under the U.S. Constitution, state laws like Minnesota's that classify brewers on the basis of size would most likely be upheld. Other state laws that condition favorable tax treatment on in-state location of the activity, inputs or product would most likely fail a constitutional test. The

domestic courts of the U.S. would make careful, well-informed, well-reasoned and justified distinctions between these different types of tax laws. The *Beer II* panel did not.

Ignoring Federalism: Even more disturbing is the *Beer II* panel's use of a "least restrictive measure" standard for defining national treatment in order to determine whether discrimination exists. Using the least restrictive measure standard, the panel ruled against higher regulatory standards of some states on the basis that other states had lower standards. Some states impose requirements on the methods of distributing beer as an effective and efficient means of collecting excise taxes. Other states, however, do not impose the same requirements. The *Beer II* panel's ruling allowed no room for different requirements based on different circumstances confronted by various states, nor did the panel allow any room for differing judgments by separate sovereigns as to the most appropriate requirements to impose to effect collection of taxes.

By imposing on all states the least restrictive measure standard among the states for assessing whether a neutrally structured and intended measure operates on a *de facto* basis to discriminate under the national treatment obligation of GATT, the *Beer II* panel struck at the very heart of federalism. The panel's reasoning leaves no room for different laws based on different local circumstances, nor for any range of judgment, regardless of the absence of any discriminatory intent in those judgments, to be exercised by different state sovereigns. Indeed, the combination of the least restrictive measure standard and the acceptance of *de facto* arguments leaves all state law potentially at risk of being subject to challenge under the aegis of GATT and GATS. Higher taxes levied by a state in which a company from one nation does business could be challenged as discriminatory simply because a competitor does business in another state with lower taxes. The following examples illustrate the potential problems created by the *Beer II* reasoning, if applied to state taxation:

- If Chilean wine is sold primarily in states with low wine taxes, while French wine is sold more often in states with higher wine taxes, the French firms could win a *de facto* MFN judgment for a GATT panel against states with higher wine taxes.

- If the gross receipts tax on a foreign-owned long distance telephone company is higher in the states in which it operates than the tax rates on American-owned long distance (or local) phone companies in other states, the foreign-owned company could win a *de facto* "national treatment judgment" against the higher tax states.

- If a foreign-owned bank pays higher property taxes in the one state in which it operates (for example, NY) than do banks, on average, in other states, it could win a national treatment judgment against the high tax state. (This result would potentially disrupt the billions in revenues realized from property taxation, a form of taxation that is covered by GATS. Property taxes are the primary source of support for education in the United States.)

Since GATT/GATS, as *drafted*, does not recognize federalism and looks at "discrimination" on a national basis, differences among states in tax treatment of similar *economic* activity could be used by foreign multinationals to win tax breaks from GATT/GATS panels using the "least restrictive measure" reasoning of the *Beer II* panel. The obvious result of such rulings would be to *destroy* America's federal system. Each state would be barred by GATT/GATS panels from setting its own tax policy, settling instead to the lowest level of taxation by any state.

GATT Overrules the U.S. Constitution: The *Beer II* panel decision does not recognize governmental powers that are reserved to the States under the U.S. Constitution. The panel found in *Beer II* the States' alcohol regulatory practices, which could not be described as intended to discriminate against foreign or interstate commerce or to promote economic protectionism, to violate GATT obligations. This violation was found even in the face of the central government's (federal government's) lack of power to require the States to change their alcohol regulatory practices that are reserved to the States under Twenty-First Amendment of the U.S. Constitution. In essence, the panel has used a congressionally approved international trade agreement to overrule the U.S. Constitution—something the U.S. Supreme Court cannot even do. (In light of this reality, it appears to be in the national interest at a minimum to include a reservation and/or exemption within GATT and GATS that prevents Member retaliation for instances attributable to state actions that are reserved to and protected by the U.S. Constitution.)

C. Why State Laws Based on or Required by Federal Law Should be Protected

States, especially in the income tax area, have frequently based their state tax treatment on federal law. The practice of "piggybacking" on federal laws typically simplifies tax compliance and reduces costs for taxpayers and states alike. This practice generally supports the free flow of commerce and should not be discouraged by GATS or GATT. Accordingly, state laws based on federal law should not be subject to a separate challenge under these trade agreements.

In addition, there are several state or local tax practices that are required by federal law. This category of state and local taxation should be similarly be protected from the jurisdiction of the trade agreements, more because of the federal interests involved than the state interests.

Three examples illustrate the category of laws involved in state taxing practices reflecting federal law:

- Tax exemptions for non-profit and U.S. government enterprises,
- Protection of businesses engaged in interstate, but not foreign, commerce, from state income taxation under PUB. L. 86-272, and.
- Tax exemptions for U.S. and state government securities.

Non-Profit and Government Service Providers

Non-profit entities and government institutions and enterprises are major providers of services in the U.S. Examples of the types of services provided include hospital and medical care, education, child care, social and welfare services, scientific and other research and development, cultural development, *etc.* Generally speaking, such enterprises are accorded a variety of tax preferences to foster their "worthy causes" despite the fact that they may be competing directly with for-profit, taxable service providers in the same market. Such non-profit enterprises are normally exempt from federal and state income taxation on their "related" income and income derived from donations. In many states and jurisdictions, they will also be accorded property tax exemptions and may be exempt from sales tax on either or both their purchases and sales.

Tax benefits typically are not linked to national origin of the service provider: however, in most cases eligibility for the tax exemption requires designation under the Internal Revenue Code as a public charity or other non-profit entity. In addition, in some states, eligibility for the tax exemptions will require that an entity "be organized under the laws" of a particular state, be certified by a state governing body (*e.g.*, hospitals), or be an in-state institution (*e.g.*, educational institutions).

Both the competition between tax-subsidized non-profit and for-profit service providers as well as the "domestic-content" requirements for certain charities might raise National Treatment and/or Most Favored Nation issues.

In the *financial services area*, there are a number of government-provided services which should be considered. Both the federal and state governments have formed a variety of instrumentalities and enterprises to serve as *financial intermediaries* on behalf of their citizens. Such intermediary services can be (and in some cases are) provided equally well by for-profit entities. Examples include:

- Secondary mortgage and other lending agencies, such as Federal National Mortgage Association, Government National Mortgage Association, and state and federal student loan insurers and marketing entities;

- Bond underwriting where some states have formed "bond banks" to underwrite the issues of small governments and to re-sell larger issues to the general market;

- Mortgage and commercial lending in specified geographic areas where states and localities raise capital and lend directly to individuals and businesses in areas where market evaluations of risk (and other factors) have caused a shortage of capital.

Generally speaking, entities engaged in these types of activities are accorded property tax exemptions on physical facilities under the Supremacy Clause of the Constitution and state constitutional equivalents. In addition, income from debt instruments issued by some types of these entities may be exempt from state income taxation. Finally, investments in certain of these entities may be granted a special preference (*e.g.*, a tax credit for investment in a state-sponsored or endorsed venture capital fund).

Once again, the tax preferences which derive from government sponsorship or involvement in a service activity which competes directly in some instances with private, for-profit, providers raises GATS concerns.

PUB. L. 86-272

Following action by the U.S. Supreme Court that signaled a lower constitutional standard to support a state's jurisdiction to impose an income tax on an interstate business than business had previously thought applicable, Congress quickly passed PUB. L. 86-272, 73 STAT. 555 (1959), 15 U.S.C. 381. PUB. L. 86-272 established a higher jurisdictional threshold for state income taxation than was constitutionally required by "prohibit[ing] a State from taxing the income of a[n enterprise] whose only business activities within the State consist of 'solicitation of

orders for tangible goods,[3] provided that the orders are sent outside the State for approval and the goods are delivered from out-of-state." *Wisconsin Dept. of Revenue v. William Wrigley, Jr., Co.*, 112 S.Ct. 2447, 2450 (1992). PUB. L. 86-272 allows companies engaged in *interstate commerce* to determine their potential for being subject to the income tax jurisdiction in particular states by planning the level of their affairs in those states. PUB. L. 86-272 establishes a higher safe-harbor level of activity *(i.e.*, activity that does not result in the loss of immunity from a state's income tax) than would be available in the absence of the statute. The planning potential of PUB. L. 86-272 affords interstate business flexibility to determine its own taxability under income taxes of a state depending upon whether the end-result of *multistate* apportionment results in an overall lowering of the company's state tax bills. Thus, a company might choose to be subject to another state's tax *(i.e.*, exceed the safe-harbor of PUB. L. 86-272) if that state has a lower overall effective tax rate than another state in which it is already subject to tax. Taxability in these circumstances would result in apportioning income from the high rate state to the lower rate state, lessening the overall income tax bill of the company. Similarly, a company may seek to avoid a level of activity in a high tax rate state to avoid having to apportion income to that state. These are just a few of the planning potentials afforded by PUB. L. 86-272; there are many other opportunities to use PUB. L. 86-272 to minimize the overall multistate tax bill of a vendor of tangible personal property.

Since the planning potential afforded by PUB. L. 86-272 is limited to *interstate commerce* and is not available to *foreign commerce*, 73 STAT. 555, 15 U.S.C. §381, a foreign controlled company engaged in foreign commerce might well complain about the lack of national treatment received from the inability to engage in the same tax planning that is available in interstate commerce. For example, a complaint could be based upon a domestic service provider (as defined by GATS) being able to plan under PUB. L. 86-272 without losing income tax immunity a greater level of activities within a high tax state than could a foreign

---

[3]Although the U.S. statutory protection afforded by PUB. L. 86—272 is limited to sales of tangible personal property, PUB. L. 86—272 still has relevance to GATS. The relevance exists, because the boundary line between "the supply of services" under GATS, an international trade concept, and "sales of tangible personal property," a domestic law concept, are not necessarily contiguous. Even if the concepts were defined by the same body of law, that circumstance would not avoid the "penumbral area" that lies between sales and services. Thus, for example, a taxpayer engaged in interstate commerce may be able to insulate successfully under PUB. L. 86-272 the supply of a service that is bundled with the sale of tangible personal property, when a taxpayer supplying the same service in foreign commerce would not have the same potential protection. Similarly, the sale of a magazine containing advertising or the sale of software has the potential of being determined as either the sales of tangible personal property or the supplying of a service depending upon the circumstances and applicable law.

service provider to whom PUB. L. 86-272 is unavailable. The foreign service provider undoubtedly would emphasize the impact of this differential on developing market share. The remedy for this lack of national treatment would be either to extend PUB. L. 86-272 to foreign commerce, a result that would severely upset the states which view PUB. L. 86-272 in its present form as an unnecessary intrusion on their state tax sovereignty, or to repeal PUB. L. 86-272, a result that would severely upset business which views PUB. L. 86-272 almost in the same vein as a constitutional right.

U.S. Government Securities

The doctrine of intergovernmental tax immunity is grounded in the Constitution of the United States. At its core is the concept that both the state and federal governments are sovereign within their respective spheres and that one sovereign may not use its taxing power to impose on the operations of the other. While the doctrine is reflected in several areas, that which is important here involves the taxation of government securities and debt instruments.

To protect federal borrowing power, state and local governments are precluded from taxing U.S. government obligations except under a non-discriminatory franchise tax or other non-property tax (31 U.S.C. §3124). Reciprocal immunity is accorded through §103(a) of the Internal Revenue Code, which provides for the exclusion of interest on state and local government obligations from gross income for federal tax purposes. While interest on government obligations is taxed under the federal income tax, states do not tax interest on most obligations issued by themselves, their instrumentalities, or their political subdivisions. This is done as a means of reducing a state's borrowing costs, but not subsidizing that of other jurisdictions.

To our knowledge, however, interest on obligations issued by foreign governments and their instrumentalities and subdivisions is taxable under the U.S. income tax and state income taxes when the taxpayer has a taxable presence in the United States.

This fact scenario might be challenged by foreign interests under both the National Treatment and Most Favored Nation provisions of GATS. (There is no estimate made here, however, as to the outcome of this or any other challenge against a state or federal tax provision.) U.S. government obligation interest is exempt from state taxation, while that of other countries is not. In addition, states provide a preference for interest on their obligations compared to those of other states and countries. It would seem that the issue would most likely arise with respect to U.S. branches of foreign financial institutions and foreign insurance

companies operating in the U.S. Both types of businesses use investments in government obligations for reserve and liquidity purposes.

D. Note on Attachments:

Proposed Most Favored Nation Exemptions and National Treatment Reservations,

Explanation of Potentially Binding Nature of, Dispute Settlement Body Rulings on the States

Attached are drafts of Most Favored Nation Exemptions and National Treatment Reservations under GATS that address most, if not all, of the problems described above. In both cases, there are two proposals. One would exclude from GATS tax measures that "substantially replicate, or discharge requirements or manifest the policy of" federal laws. The second would exclude from GATS state or local taxes determined by state or federal courts to be consistent with the U.S. Constitution. Continuing dialogue and analysis may lead to both a modification of these proposals to ensure that they cover fully the problems presented in this document.

Comparable proposals for Exemptions and Reservations under GATT will also be developed and presented for consideration.

Also attached is an explanation of how Dispute Settlement Body rulings under GATT and GATS may become legally binding on states, even though they are not legally binding on the U.S. government. This understanding of the legal status of states under GATT and GATS supports the conclusion that state tax laws should be subject to the standards of the U.S. Constitution, and when found to be consistent with the Constitution, state tax laws should not be subject to further or separate review under GATT and GATS.

STATE DRIVEN EXEMPTIONS TO MOST FAVORED NATION ARTICLE OF THE GENERAL AGREEMENT ON TRADE IN SERVICES

SECTOR: All.

DESCRIPTION:

1. Differential treatment under tax measures of the States or political subdivisions of the States that substantially replicate, or discharge requirements or manifest the policy of. the U.S. Internal Revenue Code or other applicable federal law.

Conditions creating need for the exemption: State income taxes and franchise taxes based upon income generally conform to the U.S. Internal Revenue Code with some variation arising from the differences in perspective, *i.e.*, a national economic perspective versus subnational economic perspective. State income taxes and franchise taxes based upon income may also conform to other applicable federal law that affects federal taxation or imposes obligations upon state taxation. To the extent the U.S. Internal Revenue Code or other federal law affecting taxation contains provisions that need to be scheduled as exemptions to Article II of the General Agreement on Trade in Services, States generally conforming to the Code or other federal law require the same exemption. In addition, differential treatment arising from a State discharging the requirements, or substantially manifesting the policy, of applicable federal law must be scheduled to the extent congressional approval of the General Agreement on Trade in Services does not effect a repeal of that applicable federal law. Differential treatment arising from U.S. constitutional restrictions on state taxation that do not invoke the Foreign Commerce Clause (U.S. Const., art. I, sec. 8, cl. 3) would be one area where this latter circumstance would occur.

2. Differential treatment arising under tax measures of States or political subdivisions of States that satisfy the requirements of the U.S. Constitution as determined by the courts of the States and the United States.

Conditions creating need for the exemption: Unlike the central government, States, as subnational governments, are severely restricted by the U.S. Constitution from implementing policies that affect foreign relations, including international trade. The central government of the United States enjoys the exclusive right to engage in the foreign relations. In addition, States and political subdivisions of States may not discriminate against or unreasonably burden either interstate or foreign commerce. (U.S. Const., art. I, sec. 8, cl. 3). These U.S. constitutional prohibitions reflect the normative value drawn from the historical experience of the United States prior to its adoption of the U.S. Constitution that subnational governments of the United States should not adopt discriminatory or unreasonably burdensome policies that interfere with the free flow of domestic or foreign commerce. The U.S. Constitution adequately and fully protects the policy of the MFN article of GATS. States could not maintain policies that would thwart the most favored nation policy of GATS in the face of a domestic court challenge brought in the United States.

COUNTRIES TO WHICH MEASURE APPLIES: All.

INTENDED DURATION: Indefinite.

STATE DRIVEN RESERVATIONS TO NATIONAL TREATMENT ARTICLE OF THE GENERAL AGREEMENT ON TRADE IN SERVICES

SECTOR: All.

DESCRIPTION:

1. Differential treatment under tax measures of the States or political subdivisions of the States that substantially replicate, discharge requirements or manifest the policy of, the U.S. Internal Revenue Code or other applicable federal law.

Conditions creating need for the exemption: State income taxes and franchise taxes based upon income generally conform to the U.S. Internal Revenue Code with some variation arising from the differences in perspective, *i.e.*, a national economic perspective versus subnational economic perspective. State income taxes and franchise taxes based upon income may also conform to other applicable federal law that affects federal taxation or imposes obligations upon state taxation. To the extent the U.S. Internal Revenue Code or other federal law affecting taxation contains provisions that need to be scheduled as exemptions to Article II of the General Agreement on Trade in Services, States generally conforming to the Code or other federal law require the same exemption. In addition, differential treatment arising from a State discharging the requirements, or substantially manifesting the policy, of applicable federal law must be scheduled to the extent congressional approval of the General Agreement on Trade in Services does not effect a repeal of that applicable federal law. Differential treatment arising from U.S. constitutional restrictions on state taxation that do not invoke the Foreign Commerce Clause (U.S. Const., art. I, sec. 8, cl. 3) would be one area where this latter circumstance would occur.

2. National treatment shall be accorded with respect to measures of the States or political subdivisions of the States by operation of the Commerce Clause of the U.S. Constitution (art. I, sec. 8, cl. 3) as determined by the courts of the States and the United States and not by Article XVII of GATS.

Conditions creating need for the exemption: States, as subnational governments of the United States, are sovereigns independent of the central government of the United States within their own sphere of influence. Nonetheless, the U.S. Constitution restricts the States and their political subdivisions in the exercise of their sovereign taxing power. States and political subdivisions of States may not discriminate against or unreasonably burden either interstate or foreign commerce. (U.S. Const., art. I, sec. 8, cl. 3). These U.S. constitutional prohibitions reflect the normative value drawn from the historical experience of the United States prior to its adoption of the U.S. Constitution that subnational governments should not adopt discriminatory or unreasonably burdensome policies that interfere with the free flow of domestic or foreign commerce. The U.S. Constitution adequately and fully protects the policy of the national treatment article of GATS. States could not maintain policies that would thwart the national treatment policy of GATS in the face of a domestic court challenge brought in the United States.

COUNTRIES TO WHICH MEASURE APPLIES: All.

INTENDED DURATION: Indefinite.

STATE TAX EXPOSED TO DECISIONS OF DISPUTE SETTLEMENT BODIES IN MANNER NOT APPLICABLE TO FEDERAL GOVERNMENT

Some argue that the states are not endangered by the prospect of international trade decisions pertaining to state taxation being made by the Dispute Settlement Bodies. (DSBs are established as a part of the World Trade Organization's procedures for consulting on and resolving disputes coming within covered agreements, such as GATT and GATS.) The rationale given for this position that states should not fear decisions of DSBs is that these decisions do not have "the force of law." Presumably, this contention is based upon the understanding that a decision of a DSB is enforceable only through compensation (a voluntary act of the offending Member) and/or suspension of concessions or other obligations by the injured Member. While the perspective that decisions of DSBs are not enforceable may be valid as far as the United States *(i.e.,* the federal government) is concerned, it has little validity when assessing the position of the states (subnational governments) in the context of congressionally approved international trade agreements.

States, unlike the federal government, are subject to congressionally approved international agreements as the supreme law of the land. This means that inconsistent state law, whether adopted before or after the effective date of a congressionally approved international agreement, falls in the face of a valid challenge based upon the international agreement. Therefore, it seems extremely unlikely (except for at least one special circumstance identified below) that a state could avoid the impact of a final, adverse decision of a DSB in a state tax proceeding brought by a taxpayer who was challenging a state tax and relying upon a decision of a DSB for its position. The decision of the DSB would after all be the definitive interpretation of the obligations of the Member as established by the covered agreement. The decision would be definitive, because failure of the offending Member to implement the decision would allow the injured Member to suspend concessions. If a single state of the United States could ignore the decision of a DSB, that state would be in a position to determine whether the United States as a whole suffered a loss *(i.e.,* retaliation for noncompliance) to the injury of other constituent parts of the Nation. It is no less important to understand that this extraordinary consequence would occur in a field (i.e., foreign affairs) that the U.S. Supreme Court has indicated requires the subordination of state tax sovereignty in order to preserve the United States "speaking with one voice when regulating commercial relations with foreign governments." *Japan Lines, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 449 (1979).

As a general proposition, therefore, a decision of a DSB could not be blithely ignored through labeling it as lacking force of law. In a state tax proceeding brought to challenge a state tax whose invalidity had been determined in the face of the obligations of an international agreement, the defending state would be hard pressed to avoid almost *automatic* application of the DSB decision.

There is at least one circumstance, however, where a state faced with an adverse decision of a DSB probably could avoid application of that decision. The circumstance would be where the United States expressly announced that it did not accede to the decision and that the decision would not be implemented. In this circumstance the United States' one voice would support the validity of the state tax being challenged and there would be no legal impetus to invalidate the tax. The prospect of the federal government giving aid to the states in the face of an adverse decision of a DSB does not give the states significant comfort, however. The states' experience with the federal government is that it *cannot* count on federal government's support. Indeed, the states have experienced the federal government taking in matters affecting foreign affairs positions adverse to the states, where the U.S. Supreme Court, our nation's highest arbiter of construction, has subsequently determined the federal government's position to be in error. *E.g., Wardair Canada Inc.* v. *Florida Dept. of Revenue,* 477 U.S. 1 (1986). Treasury's basic antagonism to world-wide combined reporting is another experience states have recently had that counsels caution in relying on the federal government's goodwill "to protect the interests of the states."

wrd\gtscen3c.doc
02/94

STATEMENT OF ANDREW KENTZ
DEWEY BALLANTINE
ON BEHALF OF THE
SEMICONDUCTOR INDUSTRY ASSOCIATION

The Semiconductor Industry Association (SIA) is pleased to submit written testimony to the Committee on Ways and Means regarding the continued vitality of Section 301 of the Trade Act of 1984 and the structure and role of the proposed World Trade Organization (WTO). SIA represents 85 percent of the domestic semiconductor producers and its member companies employ 240,000 individuals nationwide. The GATT Uruguay Round Agreements and the establishment of the WTO will radically alter world trade dispute resolution and will have a significant impact on U.S. industries from all economic sectors, including the semiconductor industry and its employees.

SIA supports Congressional approval of the Uruguay Round in the context of satisfactory implementing legislation. There are a number of concerns that must be successfully resolved in that legislation to ensure that U.S. manufacturers are not exposed to unfair and protectionist trade practices by foreign competitors and governments. SIA supports strengthening the antidumping laws to the fullest extent allowable under the Uruguay Round Agreements; assuring the effectiveness of Section 301; extending the President's tariff negotiating authority; and ensuring the protection of intellectual property rights.

Section 301

Section 301 of the Trade Act of 1974 has been an effective tool for opening closed foreign markets and enforcing trade agreements. In the mid-1980s, the U.S. government, after repeated yet frustrated efforts to negotiate access to the Japanese market for semiconductors, successfully employed Section 301 to apply sanctions and ultimately provide an opening to the heretofore closed Japanese market. The U.S. Japan Semiconductor Agreement would not exist were it not for the effective use of Section 301 to ensure access to the Japanese market, the second largest semiconductor market in the world. To a large extent as a result of the negotiating leverage provided by Section 301, the foreign share of the Japanese semiconductor market stands at 20.7 percent, as of the first quarter of 1994. While the foreign share of the Japanese semiconductor market has increased, progress remains to be made.

Section 301 provides vital leverage for the United States in opening otherwise closed foreign markets. SIA is concerned that in the eyes of foreign governments, the Uruguay Round Agreements may have seriously weakened, perhaps fatally, the effectiveness of Section 301. Many foreign governments and their trade negotiators assert that the United States will be unable to utilize Section 301 without the concurrence of WTO panels. Ambassador Kantor has repeatedly assured Congress and U.S. business interests that, despite these foreign claims, the United States is not required to bring all disputes to the WTO for resolution and that the United States still has the right, and indeed will exercise that right, to act unilaterally to resolve market access problems. More specifically, the USTR has stated that the United States will bring Section 301 actions to resolve disputes even if such actions might be characterized by foreign trading partners as violating international obligations.

SIA supports Ambassador Kantor's stated position and believes that it must be explicitly set forth in the implementing legislation. USTR's right to act under Section 301 -- even without WTO authorization -- to respond to particularly egregious foreign trade practices must be reenforced by Congressional action. The implementing legislation also should provide the USTR broad authority to take unilateral action in areas of anticompetitive practices, such as export targeting, not covered by the Uruguay Round Agreements.

Dispute Resolution Process

In creating the WTO, and its underlying dispute resolution process, the Uruguay Round Agreements represent a dramatic revision to the manner in which world trade disputes will be resolved. Although the WTO is vested with trade dispute resolution authority, that authority is not unlimited and the United States should

continue to maintain full control over its own laws, rights and obligations. It is essential that the implementing legislation make clear that the WTO has no authority to overturn U.S. law or practice and that the implementation of any U.S. statute may not be modified to conform to a WTO decision unless approved by an Act of Congress.

The United States has assumed numerous obligations and responsibilities under the Uruguay Round Agreements. The interpretation of these obligations and responsibilities by the WTO will have a broad and profound impact on all sectors of the U.S. economy. SIA believes that the dispute settlement process must be fair and transparent. In order to ensure fully effective responses from the United States, full private party participation in the dispute settlement process by those parties with an economic interest in the proceedings and that support the U.S. government position in those proceedings, must be specifically provided for in the implementing legislation. U.S. private sector interests can provide valuable assistance to U.S. government lawyers in WTO proceedings.

Conclusion

The domestic semiconductor industry depends on both a strong domestic market and exports into the world marketplace. The Uruguay Round Agreements represent significant progress toward free and fair market trade. The implementing legislation, however, must be developed in such a manner that the United States is assured of its rights to act unilaterally to open closed markets and retains full authority over its trade laws and practices.

June 17, 1994

Janice Mays, Esq.
Chief Counsel and Staff Director
Committee on Ways and Means
U.S House of Representatives
1102 Longworth House Office Building
Washington, D.C. 20515

Dear Ms. Mays:

Re: The World Trade Organization (WTO): the question of sovereignty (Committee on Ways and Means Release # 22)

This submission is made on my own behalf as a trade lawyer with a strong interest in the GATT and the WTO. Our firm authored a treatise on the negotiating history of the Uruguay Round [Terence P. Stewart, Editor, The GATT Uruguay Round: A Negotiating History (1986-1992) (Kluwer Law and Taxation Publishers, 1993)] which we are presently revising to reflect the final agreement signed in Marrakesh in April of this year I have followed the negotiations closely and have reviewed the final text and its earlier iterations carefully. I am aware of the efforts made by Ambassador Kantor and his team to address concerns raised by various groups both with regard to WTO standard for decision making, amendment and interpretation, on dispute settlement, and to maintain the ability to enforce environmental and other standards at a level above international norms where scientifically based.

I have had the opportunity to review the prepared statement of Ambassador Kantor for his June 10, 1994 appearance before the Committee. While I would quibble with a few of the descriptions,* in general I agree with his assessment that the WTO/DSU does not constitute a significant loss of sovereignty. Congress can, of course, further safeguard sovereignty by how it handles the question of implementing legislation.

WHETHER THE URUGUAY AGREEMENT DIMINISHES UNITED STATES SOVEREIGNTY

Introduction

Justice Oliver Wendell Holmes stated that, "The very meaning of sovereignty is that the decree of the sovereign makes law." American Banana Co. v. United Fruit Co., 213 U.S. 347, 358, 53 L. Ed. 826, 833 (1909). Another scholar has stated:

> It [sovereignty] stands for the power of modern States *** to decide and to act without consulting others ***.

Brierly, "The Sovereign State Today," 61 Jurid. Rev., 3,5 (1949), quoted in 1 Whiteman, Digest of International Law 237 (1963). Sovereignty is a relative concept, however, in the view of many theoreticians. Schwarzenberger writes, for example:

> Rules of international customary law, general principles of law recognized by civilized nations and, above all, treaties impose far-reaching limitations on the sovereignty of States. In a system of interrelated legal principles, sovereignty is necessarily a relative concept. [Emphasis added.]

Schwarzenberger, I International Law (3d ed., 1957) 121, quoted in I Whiteman, supra, at 236-237; see also Aufricht, "On Relative Sovereignty," 30 Cornell L. Q. 137 (1944), quoted in 1 Whiteman, supra, at 236. Thus, treaties curtail sovereign prerogatives, strictly as a practical matter, and a treaty transferring power to prescribe law to an international organization can be viewed as diminishing the transferor's sovereignty.

---

* For example, while it is true that the U.S. has used GATT dispute settlement to pursue matters covered by the GATT and hence the pursuit of services and TRIPs issues through the WTO dispute settlement process will not constitute a change, the real issue of concern for some groups in these areas (particularly intellectual property) is that the transition rules will make inconsistent existing practices non-actionable under the WTO for many years. USTR does, of course, maintain the ability to act unilaterally if the issue is viewed politically as important enough.

On its face, the "Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations" (1993) ("Final Act") is a major international agreement covering a wide range of matters and could be viewed as constituting a transfer of U.S. sovereignty to an international organization with jurisdiction to make law. Such a transfer (subject to retrieval should the U.S. determine to withdraw or modification if the U.S. or other countries obtain changes in the agreements) is the essence of international agreements. The agreement establishes the World Trade Organization ("WTO"), an institution empowered to act in areas where the U.S. Congress has plenary power under the Constitution to regulate U.S. foreign commerce, and within that body it would also establish a formal dispute settlement mechanism, known as the Dispute Settlement Body ("DSB"). That body would be empowered to adjudicate whether U.S. law conforms to the country's GATT obligations, and to "authorize" aggrieved countries to suspend concessions to the United States if the latter does not change its law. Further, the WTO would be empowered to interpret its agreements by less than a consensus of all Members, and the organization could bring great pressure to bear on any country unwilling to adopt amendments to the Final Act. These themes are discussed immediately below. The more practical question of whether the agreement is in U.S. interests is addressed below.

The WTO and DSB

As conceived by the Final Act, the WTO has legal personality recognized in international law, and it constitutes a legal framework in which "Members" conduct their trade relations in matters related to various agreements concluded in the Uruguay Round. See Arts. VIII and II.1, WTO Agreement. These agreements are part and parcel of the Final Act itself. Id., Art. II.2. Certain of the agreements composing the "framework" are expressly "binding on all Members," id., Art. II.2, including those involving trade in goods (Annex 1A to the Final Act), trade in services (Annex 1B), intellectual property (Annex 1C), formal dispute settlement procedures (Annex 2), and a mechanism for trade policy review (Annex 3). All WTO Members are supposed to conform their laws and practices to the agreements that make up the Uruguay Round package; the WTO Agreement expressly provides:

> 4. Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.

Art. XVI. Article XVI further directs:

> 5. No reservations may be made in respect of any provisions of this Agreement. Reservations in respect of any of the provisions of the Multilateral Trade Agreements may only be made in accordance with the provisions set out in those Agreements.

These provisions, on their face, require all signatory countries -- including the United States -- to implement the changes agreed to as part of the package (duty reductions being an obvious example). Congress' power to regulate commerce in a manner inconsistent with our new international obligations and rights would effectively be circumscribed, but only to the extent that the United States chooses to abide by its terms. As discussed below, a country cannot be forced to change its laws or regulations against its will if it is willing to pay compensation or face retaliation. Indeed, countries always maintain the right to withdraw from the WTO. Loss of flexibility or "sovereignty" must refer rather to the ability to legislate without concern for international norms or the need to offer compensation or face retaliation. As presently discussed, this loss could include, inter alia, power to fashion an antidumping law uniquely suited to U.S. concerns, and power to enact other regulatory schemes inconsistent with the Final Act. In the words of Justice Holmes, the United States would forfeit its right to "make law" in the areas involved, at least without facing certain predictable international pressures and/or consequences. For very large players like the United States, there may be concrete examples where unilateral action is possible without compensation or concerns about retaliation. Practically, however, concerns about the reaction of our trading partners is often an element in the position of the administration or of the Congress on trade and other matters.

Structurally, the WTO contemplates a Ministerial Conference composed of representatives of all member countries. Art. IV.1. The body would meet only periodically, id., so there is also established a General Council authorized to meet "as appropriate." WTO Art. IV.2. The Council is, among other things, empowered to

discharge the responsibilities of the GATT DSB, a substructure whose powers are delineated in the "Understanding on Rules and Procedures Governing the Settlement of Disputes" ("DSU"). The "Understanding" constitutes Annex 2 to the WTO Agreement, and is one of the agreements "binding" on Members. See Arts. IV.3 and II.2, WTO Agreement. As with the Ministerial Conference, the General Council is composed of representatives of all member countries. Art. IV.2.

In essence, the DSU is a legal framework for resolving disputes among member countries respecting rights and obligations under the Agreements of the Final Act. The DSU expressly provides that the framework is the exclusive means for this, i.e., is the only method through which Members may seek redress for other Members' failures to conform their laws and practices to the GATT. Article 23, DSU, provides as follows:

> 23.1 When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements ***, they shall have recourse to, and abide by, the rules and procedures of this Understanding.

It further provides this limitation:

> 23.2 In such cases [where redress is sought], Members shall:
>
> (a) not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements had been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding ***. ***

These provisions appear in an Article entitled "Strengthening of the Multilateral System."

In addition to dispute-settlement authority, the WTO is also empowered to interpret the Final Act itself. The WTO Agreement specifically provides that the Ministerial Conference and General Council have "exclusive authority to adopt interpretations," and that a "decision to adopt an interpretation shall be taken by a three-fourths majority of the Members." Art. IX.2. Also, in exceptional circumstances, the Ministerial Conference may decide "to waive an obligation imposed on a Member" by the WTO Agreement or any of the multilateral trade agreements, doing so by a three-fourths vote. Art. IX.3.

Finally, the WTO Agreement provides for amendments to it and the other multilateral agreements. Art. X. Four types are contemplated:

(i) Ones to certain specified provisions, requiring a consensus of the Members to adopt. Art. X.2. Examples of the specified provisions are ones defining the WTO's scope.

(ii) Ones that would "alter [Member countries'] rights and obligations." See Art. X.3. These amendments become effective for all Members agreeing to accept them, if two-thirds agree to accept, and for additional Members upon their acceptance. Id. Members unwilling to accept amendments may "opt out" unless the Ministerial Conference decides that the amendment "is of such a nature that any Member which has not accepted it within a period specified by the Ministerial Conference in each case, shall be free to withdraw fro the WTO or to remain a Member with the Consent of the Ministerial Conference". Id. The Ministerial Conference decision requires a three-fourths vote. Id.

(iii) Ones not altering rights and obligations, which amendments take effect upon acceptance by two-thirds of all Members. Art. X.4.

(iv) Ones to the Agreement on Trade-Related Aspects of Intellectual Property Rights. Art. X.6. The Ministerial Conference may adopt these amendments without the formal acceptance process. Id.

Thus, the Final Act, like the existing GATT, can be amended by less than a consensus of the Members. Ambassador Kantor and his team were able to get the draft final act modified to make it clear that for substantive amendments countries must still "opt in" or have a large majority of members refuse to let them opt out and still remain part of the

WTO. Under existing GATT rules, amendments apply only to those countries that accept them. While the ability of other countries to vote to require a country to accept an amendment or leave the WTO is new, past decision making at the GATT suggests that it is an unlikely option to be be utilized in fact.

Impact on Sovereignty

Dispute Resolution. Under current GATT practice, all Contracting Parties must agree before GATT can deem a national law as being inconsistent with GATT. A complaining party seeking dispute resolution may first request consultations, and, if the consultations fail, may then request a so-called "GATT panel" to review the complaint and make "recommendations." A full consensus is required before a "recommendation" is adopted. Therefore, sovereign countries retain the ability to defeat any "recommendation," and they thereby unquestionably preserve their prerogatives to prescribe law on the relevant point. This scheme is widely understood and its detailed procedures have been described frequently. See, e.g., Stewart and Callahan, Dispute Settlement Mechanisms [an offprint from and chapter of The GATT Uruguay Round: A Negotiating History (1986-1992) (Kluwer Law and Taxation Publishers, 1993)].

The Final Act would change these procedures in important ways. Under Art. 4, DSU, if one Member believes another is depriving it of benefits of concessions under GATT, it may first request consultations and attempt to reach an agreed-upon solution. If consultations fail, however, the complaining party may request a "panel" to "assist" the DSB in resolving the dispute. Id., Arts. 4.7., 11.1. These panels conduct hearings and finally prepare written reports, id., which reports become the bases for DSB actions taken on issues. Art. 16.4 provides as follows:

> *the [panel's] report shall be adopted *** unless one of the parties to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report. [Emphasis added.]*

Id. If any party requests an appeal, an appellate body will be established, and the appellate body will issue its report. Id., Art. 17. Art. 17.14 finally provides that:

> *[the] appellate report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the appellate report. [Emphasis added.]*

Id.

The procedure then continues as follows. If the appellate body concludes that the measure is GATT-inconsistent, it then "shall recommend that the Member concerned bring the measure into conformity" with the GATT agreement in question. Id., Art. 19.1. Thereafter, the Member concerned is obliged to inform the DSB of its intentions, id., Art. 21.3, and if it fails to conform its law, the DSB may then authorize compensation for the failure or the suspension of trade concessions vis-a-vis the offending Member. Id., Art. 22. There are further procedures for arbitration if the offending Member still objects. Id., Art. 22.6.

*The foregoing may be summarized as follows. Under DSU procedures, panel or appellate recommendations will automatically be adopted by the GATT unless all DSB Members form a consensus not to adopt the given report. Accordingly, the only alternatives of the Member country whose law is deemed "GATT inconsistent" are (a) to yield to the DSB and conform its law to that body's finding, or (b) to refuse to follow the DSB's finding and pay appropriate "compensation" or otherwise face withdrawal of concessions. There is also, of course, an ultimate option: Article XV of the WTO Agreement provides that "[a]ny Member may withdraw ***."*

With regard to the first option (conformance of U.S. law and practice), several points should be made. First, under the existing GATT, the U.S. has in almost all cases adopted adverse panel decisions, albeit sometimes after considerable delay. Hence, the requirement of automatic adoption is probably less of a change than the change in voting would suggest. There may, of course, be practical consequences of the change (less leverage over the complaining party to reach an acceptable solution from the U.S. perspective). Second, the United States was successful in the last year in obtaining agreement that only recommendations are binding on the losing party and recommendations are limited to a country bringing its law or practice into conformity.

Thus, while the panel may suggest a particular course of action which would bring law or practice into conformity, such suggestions are not binding. Art. 19.1, 19.2, DSU. This modification was an important success by Ambassador Kantor and his team to reduce the impact on Administration and Congressional authority over U.S. law. In most situations, this modification will provide the Administration and/or Congress a range of possible options to conform U.S. law and practice to a panel decision.

The latter options (refusal and withdrawal) must be put into practical perspective. These options exist in theory and of course are relevant to sovereignty in the abstract. However, the reality is that both may be politically infeasible and ultimately non-options, at least to any practical extent. The reality is that DSB rulings will carry great "moral suasion," and countries commonly refusing to comply will inevitably be branded as disrupters of the system. This would be particularly so for a country like the United States, which has always promoted law under GATT, greatly influenced the Uruguay Round, and regards itself as a "leader" of the world. If the United States refuses to conform when GATT panels rule adversely, other countries will almost certainly disregard their own obligations -- even if the United States is reasonably justified on a case-by-case basis. This is relevant to the earlier point, that sovereignty is a practical concept and largely exists only in degree. There is little value in theoretical options if the reality is that practical pressure will seldom permit the exercise thereof. It is almost certain that in all but the most extraordinary cases, the U.S. will acquiesce in adverse rulings of panels in the future. But the same is true now under the GATT.

Moreover, the same will be true for our trading partners. As Ambassador Kantor reviewed in his June 10th statement, it was the United States which pursued binding dispute settlement within the GATT during the Round as a way of improving enforcement of U.S. rights under the GATT. To the extent an industry has concerns about market access or adherence to various codes (e.g., import licensing, customs valuation, safeguards), the element of the Uruguay Round that could represent a lessening of U.S. legislative options (absent compensation or retaliation) represents the promise of kept obligations by our trading partners.

THE QUESTION OF THE SERIOUSNESS OF THE LOSS OF SOVEREIGNTY

Whether the loss of sovereignty is "serious" depends on who is asking the question. From a purely international perspective, U.S. concerns pale against the interests of the world. Professor John Jackson writes:

> It is clear that international co-operation on international economic problems is absolutely essential in the modern, shrinking world.

Jackson, World Trade and the Law of GATT 773 (Bobbs Merrill, 1969). From this viewpoint, loss of sovereignty is a small price for the benefits of global trade.* Some theorists even believe that world peace depends on trade.

From a more-narrow U.S. perspective, many U.S. officials and businesses apparently are pleased with the Uruguay Round results. While problems exist in some areas and while implementing legislation will remain critical to the support of some groups, the United States was successful in achieving many of its objectives in the negotiations.

It is also true that many U.S. industries support ratification, as can be seen from the endorsements of various companies and groups. Many service industries are pleased that services are finally encompassed by the WTO (although certain service sectors have continuing concerns). Similarly, many intellectual property-driven industries (but not all --

---

* The price may be unequal, however. Small countries may prefer to surrender sovereignty to an international body, where they find strength in numbers and feel "protected" from their stronger trading partners. In contrast, countries like the United States, whose unilateral actions carry more weight, may have less to gain and more to lose from accepting restrictions on freedom of action. The Administration obviously believes that the "price" is more than justified by the overall agreement. Whether the "price" is one "worth paying" for the United States is ultimately a political question whose answer may vary based on the group responding.

e.g., pharmaceuticals, biotechnology, movies) are pleased that intellectual property is the subject of a broad-based enforcement agreement, and that the United States now has recourse to formal dispute-settlement procedures to resolve problems in this area. Also, many industries, as well as consumers, support the substantial tariff reductions agreed to in the Uruguay Round. In short, many groups in the United States view the Round favorably, i.e., believe its benefits outweigh the price of any loss of sovereignty.

Nevertheless, particular U.S. industries face adverse structural change if the Final Act is approved. The textile and apparel industries face the dismantling of quotas under the Multi-Fiber Arrangement ("MFA") and the ultimate integration into the GATT trading system. Maintenance of the existing quota-type system will not be an ongoing option. Because of the critical nature of the textile agreement to the Final Act, the U.S. does not practically face the option of maintaining existing U.S. law and practice in this area if it intends to join the WTO. However, even here Congress and the Administration will still have certain flexibility in how the reintegration occurs (e.g., which products are integrated first, etc.).

Similarly, in agriculture, U.S. efforts to open markets abroad and start the process of imposing disciplines on subsidies in the sector have been successful. The price paid by the U.S. will be loss of the ability to impose quotas and being required to conform U.S payments to farmers to the dictates of the agricultural agreement.

Other industries that might feel threatened by the Uruguay Round results are ones that depend on the GATT rule system for maintaining fair trade (e.g., antidumping or countervailing duty laws). Some U.S. industries have had to rely on these laws to shield themselves from dumped or subsidized competition. The Uruguay Round antidumping code, depending on U.S. implementing legislation, could result in a weakening of the effectiveness of the law for combatting unfair pricing of imports [indeed, the Administration proposal (as outlined in the June 15, 1994 Administration Proposals on Key Issues) appears to do just that]. Moreover, U.S. interpretations of the law, after the law is conformed to GATT, could be the subject of GATT challenges, and the United States could be obliged to reduce the law's effectiveness.* For example, future efforts by U.S. officials to combat circumvention of Antidumping Duty Orders may be challenged in the GATT, and the DSB might ultimately report that such efforts are GATT-inconsistent. In the past, the United States could delay adoption of reports by refusing to form a general consensus. They could also look to Congress to rectify gaps appearing in the law as business practices continued to evolve and as the need for amendments became obvious. This option could be curtailed under a more restricted view of Article VI by GATT panels.

Mutual "loss" of sovereignty could also impact other areas of U.S concern. A number of groups have expressed concerns over the "green light" subsidy provisions in the new agreement, provisions which could reduce the effectiveness of existing U.S. countervailing duty law. At the same time, the U.S. has obtained certain additional disciplines and enforcement tools under the agreement. However, the difficulty with international agreements as such is the possibility for misunderstandings as to what a country has obtained in the bargain. The U.S. added a footnote to Article 10 of the Subsidies Agreement to safeguard its ability to provide R&D subsidies without prior notification and still have them viewed as green lighted. Canada has taken the position with the GATT Secretariat that failure to notify makes programs subject to countervailing duties and prevents a panel from finding the benefits non-actionable.

The GATT Agreements could also affect areas not primarily associated with trade, but which nevertheless impact trade. These potentially include such areas as the

---

* Significantly, Art. 17 of the Agreement on Implementation of Article VI of GATT 1994 (covering antidumping) provides for limited panel review of national antidumping determinations. It charges panels with determining whether factual findings were "unbiased and objective," and it contemplates deference to reasonable legal determinations. This language should curtail to some extent panel action on review. However, some within the GATT Secretariat have made statements suggesting that panel review will remain essentially unchanged following the creation of the WTO. Moreover, because the antidumping agreement is substantially more detailed both as to procedures and methodology, there should be less reason for disputes if countries in fact implement the terms of the agreement.

environment, health, standards, and the like, which are not the immediate subject of GATT, but which arguably fall under GATT jurisdiction when national regulatory schemes impact on another country's trade. Because of concerns raised by the environmental and public interest groups with the so-called Dunkel Draft, the U.S. obtained a number of important changes to the draft agreement to both the technical barriers to trade ("TBT" or standards) agreement and the sanitary and phytosanitary agreement to protect higher environmental and health standards than international norms where scientifically based. These changes should generally protect U.S. law and practices. However, some continue to raise concerns that national policies and regulations could become objects of challenges under dispute settlement procedures, and the United States could face the options of either dismantling a regulatory scheme politically desired in the United States, or refusing to comply with a GATT ruling and facing the withdrawal of some country's concessions. Whether such concerns are "significant" depends on one's appraisal of the dispute settlement process, the meaning of the terms contained in the specific agreements and the likely course of conduct of other nations.

A more subtle but very important issue relates to what GATT does not address. In contrast to the United States, many countries do not have effective antitrust rules, labor laws, and various forms of social legislation. These countries remain free to take competitive advantage of this, since the Final Act does not address these areas of concern. As demonstrated in the review of the Final Act above, to the extent that the U.S. attempted to take unilateral action in these areas by the threat of retaliation on goods or services, our trading partners would appear to have a reasonably strong case that such action is contrary to U.S. obligations under the WTO. To the extent there are not other serious retaliation threats available, or to the extent the U.S. is not willing to "pay the price" of compensation or retaliation, the U.S. may find itself without significant bargaining chips in further trade liberalization.

Stated differently, the GATT agreements could be viewed as failing to provide channels of relief from advantages resulting from lax regulation. In this regard, the loss of sovereignty may be the loss of international "bargaining chips." Some have questioned whether the United States got what it needed in the Uruguay Round, and whether binding dispute settlement may trap a country like the United States within a rules-bound gameboard which fairly captures all or nearly all U.S. practices while certain major trading partners and selected developing countries with rapidly expanding trade power are able to distort the outcome of competition in ways not regulated by the WTO. Obviously, this and past Administrations have not shared the concerns about possible serious effects on sovereignty restrictions from the entering into trade-expanding agreements. Congressional willingness to confer and extend fast track authority similarly supports the conclusion that Congress also does not view with alarm the quid pro quo of international trade negotiations and consequential limitations on sovereignty. Moreover, Ambassador Kantor's review of the Administration's position on the continued viability of section 301 for non-covered matters suggests that § 301 could be a continuing tool of market liberalization even in areas not covered or inadequately covered. Whether it will be such a tool will depend on implementing legislation and/or the willingness of this and future administrations to in fact pursue U.S. interests through § 301 and other avenues.

Ultimately, whether the potential loss of sovereignty is "serious" is a far-reaching political question, but the question, in essence, is not new. The United States has expended sovereignty in numerous previous trade agreements, including the original General Agreement on Tariffs and Trade and subsequent rounds of tariff agreements. While concerns over loss of sovereignty or constitutional issues have from time to time been raised in connection with U.S. trade legislation and international agreements, history teaches that at the end of the day, Congress has trouble viewing the results of an agreement supported by many sectors and meeting many of the Congressionally mandated objectives as unworthy of support regardless of the compromise of unilateral rights such agreements may require.

THE QUESTION OF LESSENING THE IMPACT OF THE AGREEMENT IN IMPLEMENTING LEGISLATION

The Final Act is not self-executing; implementing legislation is required. Carefully crafted legislation can lessen the Final Act's impact on sovereignty and alleviate the Act's consequences for industries likely to be affected adversely.

Lessening Impact on Sovereignty

Any implementing legislation and accompanying legislative history can be clear in defining the relationship of the Final Act to U.S. law. On its face, the Act seemingly requires countries to transfer sovereignty and conform their laws to its provisions. Under U.S. law, however, the Final Act is only a treaty in our constitutional system, and while treaties are the Law of the Land, they are also merely co-equal with statutes. A priori, both statutes and treaties must conform to the Constitution. Implementing legislation or other expressions of Congressional intent can be explicit in achieving this status and result.

The legislation that implemented the Tokyo Round of trade negotiations formally preserved the primacy of U.S. law, in section 3 of the Trade Agreements Act of 1979, Pub. L. 96-39, 19 U.S.C. § 2504. That section expressly provides that U.S. statutes will prevail if any provision of a Tokyo Round agreement conflicts with any U.S. statute. It specifically states that, in case of conflict, "[n]o [such] provision *** shall be given effect under the laws of the United States." Thus, the Tokyo agreements were given effect only to the extent they conformed to U.S. law.

A comparable provision in legislation implementing the Final Act would at least preserve formal sovereignty, even if, as a practical matter, effective sovereignty would be reduced. Such a provision could arguably conflict with the Final Act itself, which requires contracting parties to conform their laws and regulations to the Uruguay agreements, and which appears to judge the legality of municipal law by reference to the Final Act itself and rulings of the WTO; however, such a provision still seems appropriate if the United States wishes to clarify the role of GATT in U.S. law. On its face, and in its far reach, the Final Act creates ambiguity on this and easily could be misunderstood.

As for preserving effective U.S. sovereignty (to the greatest possible extent), implementing legislation could borrow further from section 3, supra, which also sets forth specific procedures for making changes to U.S. statutes to implement requirements of, amendments to, or recommendations under the Tokyo Round trade agreements. In fact, the legislation could go even further: it could guarantee that U.S. industries and all interested Americans at large would have ample right to be heard before U.S. law is changed.

Briefly, under section 3(c), whenever the President finds it appropriate to amend, repeal, or enact a statute to conform U.S. law to a Tokyo Round agreement or a GATT-panel "recommendation," he must submit an appropriate bill to Congress, and explain the action proposed. Congress may then enact the legislation bringing about the change in law. Id. Normal Congressional procedures will apply. Id.

As noted, contracting parties, under the Final Act, can no longer defeat a consensus in a dispute settlement procedure simply by refusing to accept a decision a GATT Panel would otherwise issue. Therefore, if approved, the Final Act will likely oblige the President to propose more bills to Congress to modify or repeal some U.S. law than has been the experience in the past. Thus, the practical likelihood is that Congress will be faced more frequently with issues of whether to yield to GATT or otherwise face withdrawals of concessions. It is here that implementing legislation could possibly strengthen America's rights.

One possibility would be for implementing legislation to require the International Trade Commission ("ITC") to conduct yearly reviews of all "adverse" DSB rulings, and to determine the economic and social effects of adopting those rulings. It could further require the ITC to hold hearings in each such review, and to allow interested persons to be heard. Congress could then discharge its function of accepting or rejecting the President's bill on the basis of its political judgment and the expertise of the ITC. Interested Americans could express views, and the ultimate decision would be politically more responsive, which should be the ideal result in any sovereign democratic nation.

Alleviating Particular Practical Consequences

Congress could also lessen the impact of adverse consequences for certain industries, such as textiles and apparel. Following are easily imagined measures:

Tying U.S. Compliance to Foreign Compliance. Congress could tie U.S. compliance to foreign compliance in a number of areas. For example, the textile and apparel agreement requires a phase-out of U.S. quotas over a prescribed period of time.

Implementing legislation could require the Administration to make findings that major textile-exporting countries have implemented all major commitments under the Uruguay Round before final U.S. quotas are removed. To maintain WTO conformity, U.S. law could require the findings to be published annually during the ten-year reintegration process. Congress could mandate the commencement of section 301 actions whenever failure to comply by our trading partners is alleged by a domestic industry or is identified in the annual report. U.S. law or legislative history could indicate Congressional preference that compensation or retaliation be taken in maintaining quotas vis-a-vis the particular country (or if this is not possible the adoption of additional tariffs of equivalent magnitude).

Seek Market Access. The Administration was able to obtain minor improvements in the textiles and apparel area on market access. Congress could require the President to pursue market access for U.S. textile and apparel products that are competitive overseas, but which are being unfairly excluded, using whatever leverage may exist to obtain improved access (e.g., World Bank financing, foreign aid, military assistance, etc.). Congress could also mandate that in selecting products for inclusion in the integration process, products of particular interest to textile exporting countries with inadequate market access provisions be integrated last.

Similar approaches may be available for other areas where adequacy of the Final Act raises concerns. Seeking international consensus (or at least recognition of the scientific basis) for U.S. environmental, health and other standards could reduce anxiety over potential challenges to higher U.S. standards in these important areas. The Administration was successful at Marrakesh in getting trade and the environment established on a more permanent basis within the GATT/WTO. Congress may wish to provide a time-line for handling of environmental and labor issues in implementing legislation in the GATT before potential action under a "blue" or "green" 301 and may wish to identify minimally acceptable content of an agreement.

CONCLUSION

All international agreements result in some "loss" of sovereignty. It is the nature of the process and is presumably the price nations are willing to pay to obtain the benefits of increased certainty of action by other nations. The Uruguay Round agreement is no different in this regard. While the agreement is a far reaching one, the Administration, in consultation with a range of Congressional Committees and with the private sector, did insist on a range of changes which will reduce the likelihood of U.S. laws needing to be modified to become or remain GATT/WTO consistent. Binding dispute settlement was something the Congress insisted be a major negotiating objective. Whatever the merits of a system in which our trading partners and we commit to respect international panel decisions (or pay compensation or face retaliation), it can hardly be viewed as a surprise coming out of the negotiations. Finally, the Congress and the Administration can maintain maximum flexibility in shaping U.S. policy and law through the implementing legislation and through common sense administration. And for the foreseeable future, the U.S. will maintain the economic importance to walk away from the WTO if a parade of horribles actually occurs.

Sincerely,

Terence P. Stewart

USA ITA

UNITED STATES
ASSOCIATION OF
IMPORTERS OF
TEXTILES AND
APPAREL

13 EAST 16th STREET
6th FLOOR
NEW YORK, NEW YORK 10003
212-463-0089
FAX 212-463-0583

Statement of Julia K. Hughes on behalf of the United States Association of Importers of Textile and Apparel
before
The Committee on Ways and Means
of the
United States House of Representatives
June 17, 1994

As Chairman of the United States Association of Importers of Textile and Apparel (USA-ITA) I am submitting, on behalf of the association, the following comments on the role of the World Trade Organization (WTO). This is in response to the invitation to comment issued by the Acting Chairman of the Committee on Ways and Means, the Honorable Sam. M. Gibbons on June 3, 1994. In making these comments, USA-ITA has taken into account the views expressed by participants in the public hearing on this subject held by the Committee on June 10, 1994.

USA-ITA is an association of more than 150 textile and apparel importers; importer-manufacturers; retailers and related service industries. Its members account for more than $40 billion in sales annually and the sector as a whole employs more than 1 million American workers.

USA-ITA believes that the establishment of the WTO is an important step in promoting and enforcing equitable rules governing the conduct of world trade. The dispute settlement provisions of the WTO will ensure that WTO members can no longer ignore recommendations made by dispute settlement panels, nor decisions taken by the Council. The consensus nature of the decision-making process has been codified as a practice in the WTO, with voting as a fall-back if a consensus is unable to be reached. Disputes also will be examined and settled in a more predictable and faster time-frame than before. In practical business terms this will bring more certainty to the process of resolution of disputes and thus the private sector will no longer suffer from the lack of a predictable time-table when considering whether or not to urge their governments to avail themselves of the GATT process over a particular trade issue.

USA-ITA notes that the Administration is seeking to introduce more transparency into the WTO dispute settlement process. Our members also want to ensure that this Administration goal and others are reflected in the process established in the United States to implement the Uruguay Round Agreements. Specifically, USA-ITA wants a procedure established for determining the quota integration obligations of the Uruguay Round Agreement on Textiles and Clothing that is transparent, open for public comment and where decisions made by the Administration are supported by a full published accounting of its reasons. Our association also wants a standard of review established against which decisions are taken. In order to increase the transparency and impartiality of the review process, we want a requirement included that an independent agency such as the International Trade Commission (ITC) must provide economic impact reports on each of the products currently subjected to quantitative restrictions. We have already communicated our views on this to Senate and House Leaders. The Committee's attention is drawn to our letter of June 13 to Acting Chairman Gibbons on this matter.

Reflecting the consensus nature of the WTO, we would be prepared to assist in seeking a consensus within the industry as a whole as part of the domestic textiles and apparel review process with respect to the particular products that would be integrated at each stage. However, we want a voting process established among the industry groups with a three-fourths majority vote prevailing to address the situation where a consensus may be unable to

be reached. This would necessitate a determination of the "standing" of various segments of the textiles and apparel industry as a whole, with domestic importers, importer-manufacturers, retailers and related service industries having equal or proportionately equal standing with domestic producers and manufacturers.

Taken together, these procedures would allow the Administration to better reflect in its decision-making process, the changing nature and diversification of the textile and apparel industry. Our industry is no longer wholly compartmentalized into those who source and manufacture exclusively domestically and those who manufacture and source exclusively abroad. The increasing internationalization of our industry has meant that domestic manufacturers and exporters need the flexibility to source inputs and finished product both domestically and abroad if the United States is to maintain its competitive edge.

USA-ITA considers that if the process established by domestic legislation to implement the Uruguay Round Agreement on Textiles and Clothing does reflect the transparency, predictability and other elements of the WTO process, the United States will not only fulfill its traditional role of leading by example but also will be in a better position overall to counteract any challenges made to the implementation of Uruguay Round agreements by other WTO members. At the same time, it will help ensure that US challenges are underpinned by a solid base of fair and transparent domestic procedures which faithfully reflect the obligations we are to undertake. Above all, the establishment of a domestic process along the lines out-lined above will help ensure that the benefits of the Uruguay Round agreements are commercially meaningful and can be passed on by our members to the consumer in a predictable and timely manner.

Finally, USA-ITA looks forward to working constructively with Congress to ensure that the enormous economic benefits the Uruguay Round agreements will bring to the United States are maximized so that the American consumer and worker will reap the rewards of this important world trade agreement. We believe that the WTO will only benefit the United States and will not impinge on our nation's sovereignty. The changes made to the dispute settlement process will operate for the United States, not against it. We would be dismayed if the passage of the implementing legislation was in any way impeded by perceived sovereignty issues which have no basis in fact.

On behalf of USA-ITA I would like to thank the Committee for providing the opportunity to present these comments for the written record.

Julia K. Hughes
Chairman

Testimony of Governor Tommy G. Thompson
On the Uruguay Round Agreement
Presented to the Ways and Means Committee

June 10, 1994

The recently concluded Uruguay Round of the General Agreement on Tariffs and Trade produced a worldwide trade pact that will result in a stronger national economy. The agreement opens world markets for U.S. goods, provides intellectual property and patent protection for U.S. technology, and strengthens the system for resolving trade disputes.

However, I would like to take this opportunity to express concerns about the agriculture provisions of the Uruguay Round, particularly their impact on the Wisconsin dairy industry. The Uruguay Round allows European dairy farmers, who would likely be the largest competitors to Wisconsin's farmers, to have their dairy exports subsidized at levels 20 times greater than American farmers.

The bottom line is that this agreement gives European dairy farmers a distinct competitive advantage over Wisconsin's farmers - who without a doubt are the most productive and efficient farmers in the world. Wisconsin farmers deserve the opportunity to compete on a level playing field in today's global marketplace.

Clearly, no other industry takes as strong a hit under the Uruguay Round as the dairy industry. Agriculture is the largest industry in Wisconsin, with the dairy industry contributing $10 billion annually to the Wisconsin economy. Last year, Wisconsin was again the nation's leading producer of milk, cheese and butter. So as you can see, protection of the Wisconsin dairy industry is not only vital to our state economy, but to the national economy as well.

As you know, I am a strong proponent of free trade and was a leading advocate of the North American Free Trade Agreement. But NAFTA never would have passed had Congress and the Clinton Administration not agreed to the demands of certain lawmakers for strong protection of the sugar, peanut and tobacco industries in NAFTA's implementing legislation.

As your committee and Congress considers legislation to implement GATT, I ask that you provide strong protection for the dairy industry just as you did for particular agriculture industries under NAFTA.

The enacting legislation for the Uruguay Round should include the following provisions to ensure the protection of the U.S. dairy industry:

* The U.S. Agriculture Department must be required to study the impact of the Uruguay Round on milk marketing orders. The study should include recommendations on ways to minimize the negative impacts of the Uruguay Round, ways to price and pool imported fluid milk under the federal milk marketing orders, and the feasibility of extending the assessment for the National Dairy Research and Promotion Board to imported dairy products.

* The U.S. must hold Canada to its commitments under the Uruguay Round and NAFTA to eliminate tariffs and minimum access requirements. And the U.S. must not trade wheat concessions for dairy concessions over the implementation of this agreement. (Dairy farming generates three times more farm cash receipts than wheat farming.) Canada offers Wisconsin dairy farmers the best opportunity to expand dairy exports in the near future considering the continued export subsidy advantage Europe holds.

* Full funding must be given to the Dairy Export Incentive Program at the maximum levels allowable under the agreement.

* A dairy industry market development and export board must be created to develop additional revenues to maximize export conditions and opportunities.

* Steps must be taken to provide orderly scheduling for the entry of the increased imports required under the agreement, consideration of the appropriate milk product mix for which access is provided, proper allocation of import licenses, and adequate federal inspections so product and safety standards are upheld.

If these conditions are supported by the Ways and Means Committee, Congress and the Clinton Administration, then the Uruguay Round's negative impact on the dairy industry can be minimized. Wisconsin Congressman Steve Gunderson, the Ranking Republican on the House Livestock Subcommittee, has already placed the above proposals before the House for action.

I urge your support for these proposals as well, Chairman Gibbons and members of the Ways and Means Committee, so that Congress will be certain to include them in the enacting legislation for the Uruguay Round.

I would also like to take the opportunity to ask this committee's support for including provisions in the enacting legislation that would strengthen states' rights under the Uruguay Round.

Much of the opposition to the Uruguay Round has focused on the World Trade Organization (WTO) and the claim that it may violate U.S. sovereignty. Critics of the WTO have warned that state law will be particularly vulnerable to the decisions of this new international authority.

As the National Governors' Association's Lead Governor on trade issues, I have been working to ensure that states' rights are protected when the U.S. engages in this agreement. The National Governors' Association has been working with the U.S. Trade Representative to codify the principles outlined below in implementing legislation for the Uruguay Round. I urge the Ways and Means Committee and Congress to make sure these provisions are included in the final enacting legislation for the Uruguay Round to ensure that states' rights are protected.

* State participation in the dispute settlement process must be greatly expanded. States must be involved and represented at each stage of the development of U.S. positions in dispute settlement cases involving state measures. States must also participate in any future committees and working groups that are formed within the Uruguay Round to discuss implementation of Uruguay Round principles.

* Although the Uruguay Round agreement allows states the right to set standards that differ from federal and international standards, USTR has provided assurance that this principle will be reinforced by language in the enacting legislation package.

* USTR has committed itself to assisting states with the identification of subsidies programs that can gain protection under the "green light" category of the Uruguay Round. This assistance will minimize the impact that the agreement will have on state programs designed to promote research and economic development.

* The enacting legislation must also contain language that clarifies the agreement's relationship to state law. It will limit the use of Uruguay Round provisions for private rights of action and establish an acceptable system for altering state law in the unlikely event that a state law must be changed to conform to the Uruguay Round Agreement.

I am pleased with the cooperation that has been established between the federal government and the states with respect to trade, especially with the USTR office's cooperation in addressing states' rights concerns.

The principles that have been discussed above must now be included in the final legislation Congress passes to implement the Uruguay Round. This will ensure that states' rights are protected and that states are given a voice in the new WTO system. I look forward to your committees support on this matter.

○

BOSTON PUBLIC LIBRARY
3 9999 05983 552 8

ISBN 0-16-046045-X